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ABSTRACT

This package of materials is designed to be of help to Legal Service attorneys who are, or who are about to be, active in the area of student rights in secondary schools. The materials consist mainly of complaints and supporting legal memoranda from recent student rights cases. The conception of student rights that the materials reflect is a traditional one, encompassing primarily questions involving freedom of expression, personal rights, and procedural fairness. The typical plaintiff in the cases is a high school or junior high school student who has been suspended, expelled, transferred, or otherwise disciplined because of something he said, or did, or wrote, or because of the way he wore his hair. While most of the cases focus on the question of whether or not school officials had the legal right to act as they did, some others are directed more toward the fairness of the procedures by which the disciplinary action was handled. Often both issues appear in the same case. (Author)

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Student Rights Litigation Packet

Prepared by the
Center for Law and Education
at Harvard University
38 Kirkland Street
Cambridge, Massachusetts 02138
(617) 495-4666

The Center for Law and Education is an inter-disciplinary research institute established by Harvard University and the United States Office of Economic Opportunity to promote reform in education through research and action on the legal implications of educational policies, particularly those affecting equality of educational opportunity.

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HARVARD UNIVERSITY
CENTER FOR LAW AND EDUCATION

Mailing Address:

38 Kirkland Street
Cambridge, Massachusetts 02138
617-495-4666

This package of materials is designed to be of help to Legal Service Attorneys who are, or who are about to be, active in the area of student rights in the secondary schools. Many offices are already involved in such litigation, but more Legal Service Attorneys can and should lend their aid in the conflict now going on in high schools and junior high schools between students, who have only recently been recognized as "persons" under the Constitution, and school officials, many of whom still cling to autocratic notions of their own power.

The enclosed materials consist mainly of complaints and supporting legal memoranda from recent student rights cases. The difficulty of developing truly "model" court papers in this area stems from the fact that the litigative approach best suited to a particular case is often a function of a whole range of factors which differ from place to place, such as state education laws, local school board regulations, the practices of individual school administrators, judicial precedent within a given juristiction, etc. There are, of course, recurrent constituional arguments which can be made in most of the cases and the supporting documents offer a rather complete compendium of applicable current decisions. Needless to say, this is an area of the law which is developing rapidly and close watch should be kept on sources of new judicial support.

The conception of student rights which the materials reflect is a traditional one, encompassing primarily questions involving freedom of expression, personal rights, and procedural fairness. The typical plaintiff in the cases is a high school or junior high school student who has been suspended, expelled, transferred, or otherwise disciplined because of something he said, or did, or wrote, or because of the way he dressed or wore his hair. While most of the cases focus on the question of whether or not school officials had the legal right to act as they did, some others are directed more toward the fairness of the procedures by which the disciplinary action was handled. Often, both issues appear in the same case.

While it can be argued that such a civil libertarian approach to the problems of the schools somehow misses the mark, and that reinstating a suspended student to a school he may well be better off staying out of sidesteps the real task of making the schools themselves better places, we submit that there are sound reasons for lawyers becoming involved in these kinds of issues.

First of all, and most obviously, the individual student who has been disciplined for exercising a constitutionally protected right *has* been significantly injured. Suspensions, expulsions, detentions, and other disciplinary action based on non-disruptive speech, behavior, or appearance represent the kind of harm inflicted by schools which no amount of increased money or resources can remedy. The atmosphere which results in such actions is precisely what *is* wrong with many schools. The long hair cases, for instance, may seem trvial, but a student denied his right to an education because of the way he looks reflects tellingly on the educational assumptions under which many school officials are presently operating. Since the whole notion of public school students having constitutional rights is relatively recent, many students and parents may not know where to get legal help.

Second, this kind of litigation often has an impact on the schools beyond the individual student who has been treated unjustifiably. A particular plaintiff is more often than not attacking rules or informal practices which affect students throughout the school or throughout the school system. Class actions can be brought. It may often be the case that the mere threat of litigation will spur reform of unfair or abusive school practices. When a lawsuit has been initiated, school authorities may act to moot the case before a decision is even handed down, as in *Owens v. Devlin* (enclosed), where the Boston School Committee agreed to amend its Rules and Regulations regarding the procedures followed in suspension cases.

Third, the exposure, through litigation or otherwise, of the means by which schools deny students their fundamental rights can often serve as an entering wedge for an attorney to get at other features of the schools -- discrimination in testing,tracking, allocation of resources -- which may serve as the focus of separate lawsuits or concerted community action. Interrogatories used in connection with a straightforward student rights case may, for example, unearth information necessary to substantiate other arguably illegal practices. In short, ferreting out the blatant cases of unfair treatment can be a good way to open up inquiries into a myriad of other means by which schools deny students their educational entitlement.

Litigation, obviously, is not the only way for an attorney to become involved in questions of student rights. Many cases, as mentioned, can be settled without ever going to court, especially where favorable judicial precedent or regulations exist; guidelines for suspension hearings and disciplinary codes can be drafted and lobbied for; student, parent, and community groups seeking change in the schools can be given assistance. A coalition of high school students in New York City, for instance, has recently proposed a bill of rights and is bringing pressure on the school board to get it adopted. In effect, they are negotiating collectively for a contract with the school sytem much like the one their teachers annually struggle for. In Washington D.C., a congress of high school students has also proposed a bill of rights, including the right to strike, to form political organizations, to print underground newspapers, to choose their own grading system, and to have a say in the removal of teachers.

These materials do not by any means exhaust the kinds of suits which can be brought in the student rights area. They were chosen because of their representatives. Variations on the particular fact patterns will certainly abound. It may not be necessary or desirable, for instance, to wait until a student has been suspended or expelled from school to initiate judicial action. There are numerous ways, short of suspension, that school officials can inhibit constitutionally protected behavior -- notations on transcripts, poor college or job recommendations, denial of access of extra-curricular activities, etc.

The Center will welcome any court papers which have been drawn up or filed in student rights actions and which would be of use to other legal service projects. We will act as a clearinghouse for these materials and thereby, hopefully, avoid a lot of duplication and wasted effort.

The resources of the Center are also available to provide assistance on individual cases. If you believe that there are grounds for legal action centering around a student rights issue not covered in these materials, please contact us.

SUMMARY OF MATERIALS

I. FREEDOM OF EXPRESSION

A. Scoville v. Board of Education of Joliet Township High School District 204,286 F. Supp. 988 (N.D. Ill. 1968), aff'd 2-1, 415 F.2d 860 (7th Cir. 1969), rev'd en banc on rehearing, April 1, 1970, 425 F.2d 10 (7th Cir. 1970), cert. den. 400 U.S. 826 (1970): Complaint, Brief on Appeal, Supplementary Brief, Appeals Court Opinion on Rehearing.
B. Riseman v. School Committee of City of Quincy, 439 F.2d 148 (1st Cir. 1971): Plaintiff's Brief; Court's Interlocutory Order of November 3, 1970; Casenote analyzing Riseman.
C. Eisner v. The Stamford Board of Education, No. 13220
D. Letter to Students on Right to Invite Speakers to School.

E. Letter to Students on Free Speech in Private Schools.

The Scoville case involved high school students who were expelled for distributing on school premises a publication which contained, in the words of a letter sent to the offenders' parents, "inappropriate statements about school staff members." The district court upheld the action of the school officials in an opinion which was originally affirmed by the 7th Circuit Court of Appeals. The case was reheard by that court, and, on April 1, 1970, reversed.

The Scoville case represents an important new weapon in the legal arsenal available to the high school student rights advocate, even given its most narrow construction. The opinion adopted plaintiffs argument and applied the judicial standard announced by the Supreme Court in

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), to a situation in which students were actively protesting school policies as well as the practices of certain named school administrators. (The district court opinion in Scoville was written before the Tinker case was announced, as was the enclosed brief, although a supplemental memorandum citing Tinker is included.) Tinker, which dealt with students passively demonstrating against the Vietnam war by wearing black arm bands, held that only when there existed "facts which might reasonably have led authorities to forecast substantial disruption of, or material interference with, school activities" could the First Amendment rights of high school students be restricted.

As Judge Kiley points out in Scoville, the Tinker standard is an extension of a similar rationale put forth in an earlier circuit court case, Burnside v. Byers, 363 F.2d 244 (5th Cir. 1966). The Burnside case existed at the time of the district court ruling in Scoville, but the test put forth therein was not followed. The approach taken by the first Scoville court is important to note, however, because it represents a position commonly taken by school officials and courts in these kinds of cases. That approach assumed that there was a certain class of student expression which per se justified school authorities in taking disciplinary action -- e.g., speech on school grounds which amounts to an "immediate advocacy of, and incitement to, disregard of school administrative procedures" -- and that in such cases it was unnecessary for school officials or the courts to make a factual inquiry into the question of whether or not it was reasonable to assume that the activity would result in material disruption. This approach is wrong. A student's First Amendment right to freely express controversial viewpoints can be restricted only if substantial disruption in fact occurs or can be reasonably forecast. The Tinker test is rendered meaningless if some kinds of speech or writing or behavior can be prohibited absent a judgment by school officials as to its impact on the rest of the school.

To the extent that the Tinker test protects student expression in the absence of material disruptions in school activities, a significant area of protected student expression has been carved out. Although Justice Fortas was careful to point out that Tinker was not concerned with "aggressive, disruptive or even group demonstrations," the opinion taken as a whole lends strong support to the position that neither the substance nor the means of student expression can, standing alone, constitute grounds for disciplinary action. Scoville has made it clear that high school students have the right to speak out on controversial issues, to criticize school policies and personnel, to distribute literature on school premises, to publish newspapers free from official censorship -- all subject, of course, to the interest of the school in maintaining order and to rules and regulations reasonably calculated to maintain order.

Two further points about Scoville should be noted. First, even though the plaintiff students were eventually reinstated, the case did not become moot. Relief was also requested in the form of a declaratory judgment and an injunction prohibiting school officials from making information of the expulsions available to colleges and prospective employers and from noting the expulsion on school records.

Second, the Illinois statute which gives school boards the power "to expel students guilty of gross disobedience and misconduct" was challenged on the grounds of vagueness and overbreadth, although the court did not rule on these issues. Most school authorities have grants of power cast in similar language, and in all these cases the vagueness and overbreadth arguments should be made. An important decision on this point, *Soglin v. Kaufman*, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd*, 418 F.2d 163 (7th Cir., 1969) held that a regulation prohibiting students' "misconduct" was unconstitutionally vague. See also *Sullivan v. Houston Independent School District*, 307 F. Supp. 1328, 1343-47 (S.D. Tex. 1969). Other decisions, notably *Esteban v. Central Missouri State College*, 514 F.2d 1077 (8th Cir. 1969), have come down with contrary rulings, however. For a good discussion of the overbreadth question, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

Given the fact that speaking out on sensitive issues or advocating change in school policies does, almost by definition, result in some "disruption," the *Tinker* test may turn out to be less of a breakthrough than it appears. It is, however, a beginning. Where previously high school students had virtually no legal alternatives when faced with the all-inclusive authority of the school system, they now have some breathing room. The traditional *in loco parentis* view of the schools seems to be slowly giving way, in the courts at least, to a view of education premised on the fact that neither "students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (*Tinker*). The traditional reluctance of the courts to interfere with the judgment of professional educators in matters of public school policy is now being eroded. No longer can courts uphold restraints on student expression merely because such restraints bear *some* reasonable relation to "educational goals." The interest which must be balanced against free expression, by judges and schoolmen, is neither the inculcation of a particular moral or political viewpoint, nor the fostering of respect for authority in general. Rather it is the material disruption of school activities. The arguments should no longer be over the question of whether the courts have any business meddling in the educational realm, but rather over definitions of "material disruption" and "school activities."

Sullivan v. Houston Independent School District, 307 F. Supp. 1328 (S.D. Tex. 1969), represents another kind of case in which a court gave flesh and bones to *Tinker*.

In *Sullivan* two students were expelled from high school by a principal for distributing a student newspaper, the *Pflashlyte*. The papers had been distributed on streets, in a park near the school, and in a downtown shopping area that was frequented by students -but not in the school itself. Some students brought copies to the school, however, and the two student publishers were expelled because of a minor school commotion that resulted.

Citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the court held that students have the First Amendment right to distribute student published materials both in and out of school, and that school officials may not suppress such papers merely because they present "expression of feelings with which /school officials/ do not wish to contend." Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). School officials could only prescribe reasonable rules as to the time, place and manner of distribution, which in this case they had not done. Moreover, a school rule upon which the expulsions were purportedly based, which gave the principal the power to make any rules "in the best interests of the school," was held unconstitutional both because it was so vague as not to give students notice of what conduct was prohibited, and also because it was so broad as to allow proscription of protected First Amendment activities.

Sullivan is important for the vigor with which it protects students' rights of freedom of expression. Whenever students express unpopular ideas in school, as was the case here, there is likely to be some kind of reaction by administrators, teachers, and other students, and freedom of expression for students becomes meaningless if only placid and neutral expression which invokes no concern, anger, or passion is allowed. In this case, for example, there were minor instances of disturbance: students were reading the newspaper in class and in the hallways, some papers were stuck in sewing machines and in towel distributors in the bathrooms, some students tried to discuss the paper in class, and so on. The Court did not allow these minor disturbances to override the free speech rights involved:

> It is also clear that if a student complies with reasonable rules as to times and places for distribution within the school, and does so in an orderly, non-disruptive manner, then he should not suffer if other students, who are lacking in self-control, tend to over-react thereby becoming a disruptive influence. Mr. Justice Douglas's famous quote from Terminiello v. Chicago, 337 U.S. 1, 4 (1948), is particularly important to this issue: "A function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

The materials next present two recent circuit court cases which deal with the issue of "prior restraint" or "prior censorship" of student expression within the schools. Riseman v. Quincy School Committee, 439 F.2d 148 (1st Cir. 1971), holds that students may distribute materials within school buildings and that, while school officials may prescribe reasonable rules as to time, place and manner of distribution, they may not require prior approval of the content of such papers. A Second Circuit case, Eisner v. Stamford Board of Education, 440 F.2d 803 (2d Cir. 1971), goes the other way. It holds that school officials may require prior submission of student materials to determine whether they will result in "substantial disruption" of the educational process. Eisner does (rather limply) try to mitigate some of the dangers of such censorship by requiring that school officials must make their decision promptly so that students will have the opportunity to challenge it in court. The materials below present (1) Plaintiffs' brief in Riseman; (2) An interlocutory order by the court of appeals in Riseman; and (3) A casenote analyzing and comparing Riseman and Eisner.

Other materials in this section analyze the right of students to invite speakers to school and the right of students to freedom of expression in private schools.

II. PERSONAL RIGHTS (HAIR AND DRESS REGULATIONS)

A. ACLU Model Complaint and Memorandum on Class Actions.

B. Jeffers v. Yuba City Unified School District, Civil No. S-1555 (E.D. Calif., filed April 23, 1970): Supplemental Memorandum of Points and Authorities.

C. Montalvo v. Madera Unified School District Board of Education, 98 Cal. Rptr. 593 (1971): Excerpt from amicus brief filed by American Civil Liberties Union.

D. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970): Appellees Brief on Appeal, Opinion.

E. Hatter v. Los Angeles City High School District, 452 F.2d 673 (9th Cir. 1971).

School authorities cannot arbitrarily regulate the dress or hair style of their students. The Supreme Court has never spoken out on the issue, but the language of Tinker, as well as several favorable lower court opinions, lends support to any challenge to these kind of regulations. As the court said in Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969): "Although there is disagreement over the proper analytical framework, there can be little doubt that the Constitution protects the freedom to determine one's own hair style and otherwise to govern one's personal appearance."

The opinion in Richards seems to be typical of the approach taken in most of the decisions which strike down hair regulations. Richards held that restrictions on hair style violated the Due Process Clause of the Fourteenth Amendment. "We conclude that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes." Given such a right, the court held that the defendant principal had failed to present a sufficient countervailing justification for the rule. While Judge Coffin did not elaborate on what factors would justify such restrictions, it should be argued in these cases that only considerations of health or safety are constitutionally valid reasons for regulating hair styles.

Two circuit courts, the Seventh and Eighth , have joined the First Circuit, (Richards v. Thurston, 424 F.2d 1281), in upholding the right of students to wear their hair as they please and have rejected conclusory statements by school officials that long hair "interferes" with the educational process. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969) and Crew v. Cloncs, 432 F.2d 1259 (7th Cir. 1970); and Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971). The Eighth Circuit opinion is interesting for its rare expression of judicial candor. The Eighth Circuit recognizes that long hair does not disrupt the educational process so much as it disrupts school officials themselves and their intolerance:

> Much of the board's case rests upon conclusionary assertions that disruptions would occur without the hair regulations. It is apparent that the opinion testimony of the school teachers and administrators, which lacks any empirical foundation, likely reflects a personal distaste of longer hair styles . . . . Tolerances of individual differences is basic to our democracy, whether those differences be in religion, politics, or life-style. Bishop v. Colaw, at 1076-77.

And in Crew v. Cloncs, 432 F.2d 1259 (7th Cir. 1970), the Court's candor was equally refreshing. School officials tried to justify the hair rule on the basis that long hair "disrupted" other students and presented hazards to the health and safety of students -- citing examples where other students were distracted from their work by plaintiffs' long hair, or where the hair might get in the way in gym or get caught in machinery in shop. The court rejected these purported justifications as "insubstantial" and noted that somehow the school managed to deal with the same problems in the case of girls, who also wore long hair and participated in gym and shop. In another expression which pierced the political smokescreen thrown up by school officials, the court found that

> Despite the rationalizations offered by defendants, we believe that their action in excluding plaintiff from North Central resulted primarily from a distaste for persons like plaintiff who do not conform to society's norms as perceived by defendants.

It has, then, become increasingly apparent that the "hair" controversy is at heart political. After summarizing the hair cases, a recent article concludes that

> What is disturbing is the inescapable feeling that long hair is simply not a source of significant distraction, and that school officials are often acting on the basis of personal distaste . . . . 84 HARVARD LAW REV. 1702, 1715 (1971).

Unfortunately, however, some courts have, in effect, vindicated this personal distaste of school officials. In King v. Saddleback 445 F.2d 932 (9th Cir., 1971), the Ninth Circuit, relying on wholly conclusory affadavits by school officials that long hair interfered with the educational process, upheld a hair regulation as a reasonable exercise of school officials' authority to govern the educational process. And in Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971), the Tenth Circuit dismissed hair cases from three different states saying that no federal issue was presented: "The problem, if it exists, is one for the states and should be handled through state procedures."

There are other possible means of combating hair rules and dress codes. In Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970), a district court struck down a dress code on the ground, among others, that rules requiring dress to be "in good taste" and "modest" were unconstitutionally vague. And in Hatter v. Los Angeles School District,No. 26,031, (9th Cir. Nov. 22, 1971), the same Ninth Circuit, which had upheld a school hair rule, held that students had the right to engage in first amendment activities (such as leafletting, button-wearing, and a boycott against a school "chocolate drive") to protest such dress and hair rules. In Hatter the students used their own power successfully to eliminate the school's dress codes, and the court provided legal protection for the exercise of that power even though it had refused to strike down dress code rules themselves. There is, then, more than one way to skin a cat. In Hatter, school officials argued that a dress code did not rise to the level of an issue protected by the First Amendment, but the court disagreed:

> At issue is the right of students peacefully to protest policies of their school that serve to restrain their freedom of action. That these policies may not directly affect the adult community or concern the nation as a whole is of no moment.

The ACLU model complaint for class actions challenging hair regulations is designed to avoid the problem of recalcitrant school officials who feel themselves unbound by decisions to which they or their students were not joined as parties. The memorandum following the complaint sets out the factors to be weighed in deciding when to proceed via a class action. It is applicable to the whole range of students' rights litigation. (See also the Jones procedural due process case in the next section.)

The Jeffers supplemental memorandum is organized on a case-by-case basis, and summarizes most of the recent rulings.

The materials in the package deal exclusively with long hair restrictions, but the same legal arguments are applicable to dress codes. Restrictions on dress should be subject to the same burden of justification as restrictions on other constitutionally protected rights, to wit, they must be designed to prevent substantial disruption in school activities. The New York State Commissioner of Education, for example, has ruled that school authorities can only "prohibit the wearing of any kind of clothing which causes a disturbance in the classroom, endangers the student wearing the same, or other students, or is so distractive as to interfere with the learning and teaching process." Dalrymple v. Board of Education of the City of Saratoga Springs (No. 7594).

A separate 275-page packet on selected Student Codes (May, 1971) is available from the Center for a fee of $5.00 (free to legal services programs).

Postscript: As these materials were being prepared, the U.S. Court of Appeals for the Fourth Circuit invalidated a long-hair regulation, holding that it violated a student's right to "be secure in /his/ person" under the Due Process Clause. Massie v. Henry, 40 U.S. L.W. 2544 (2/2/72). The fact that some students reacted disruptively to the wearing of long hair by others was held insufficient justification for the rule. Safety, too, was asserted by school officials as a justification, but the Court held that in laboratories where burners were present, students could wear hairbands, hairnets, or caps.

III. PROCEDURAL DUE PROCESS

A. Jones v. Gillespie, (Ct. of Comm. Pl., Phila., 22 April 1970): Complaint, Interrogatories, Brief, Court Order.

B. Owens v. Devlin, Civil No. 69-118-G (D. Mass., filed Feb. 4, 1969): Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction, Amended Rules and Regulations ("Code of Discipline").

C. Andino v. Donovan, Civil No. 68-5029 (S.D.N.Y., filed January 1969): Excerpt from Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction arguing for a fundamental right to a free public education.

D. The Public High School Student's Constitutional Right to a Hearing, CLEARINGHOUSE REVIEW, Vol. 5, No. 8 (December, 1971).

E. Codes for High School Students, INEQUALITY IN EDUCATION, No. 8, p. 24 (June 1971).

Many recent cases have challenged the practice of school authorities by which students are suspended, expelled, or transferred without being afforded a fair hearing and other procedural safeguards.

The scenarios in the cases are familiar: A student is told that he has been suspended (expelled, transferred) from school, often with no prior warning or indication of the charges against him. His parents may be invited to attend a "conference" with the principal or some other administrative official to be told the reason for the disciplinary action, after which the student may or may not be reinstated. The affairs are often hopelessly one-sided, neither the student nor his parents being given the opportunity, or the means, to challenge the accusations made by the school authorities.

The Jones case represents a straightforward judicial attack on a typical suspension arrangement. The plaintiff, representing the class of all students in the Philadelphia public schools, challenged a procedure by which students were suspended from school, often for long periods of time, without being afforded a fair hearing. The case resulted in a consent decree under which the class defendants were enjoined from suspending any student for a period longer than five days absent a proper hearing. The school district was also ordered to establish regulations regarding the elements of the hearing itself -- notice of charges, notice of time and place of hearing, right to counsel, right to appeal, etc.

The Owens litigation, while basically a procedural due process suit, involved several additional issues. Plaintiffs, first of all, were technically being transferred from their junior high school. Second, there was an element of racial discrimination involved. Third, the defendant principal failed to follow even the existing suspension procedures, inadequate as they were. The case was settled by stipulation, with the Boston School Committee agreeing to amend its Rules and Regulations regarding suspension and transfers. (The amended Rules are included.)

As a general proposition, when state education laws or local school board regulations do provide for some procedural safeguards in suspension and transfer cases, it may often be possible to argue that those safeguards are not followed. The New York State Legislature, for example, has recently passed a law guaranteeing the right to notice, to a hearing, to counsel, and to cross examination in suspension cases lasting more than five days, and the New York City School Board has established procedures governing the short-term "principal suspension." Both sets of provisions, however, are often violated by individual principals.

The short exerpt from the Andino memorandum is included because the argument contained there should serve as the starting point for any constitutional attack on arbitrary suspension and transfer procedures, i.e., that the right to a public education is fundamental and, therefore, cannot be taken away without due process of law. (Jones and Owens rightly begin with this position.) Such a right can be inferred from state education laws (e.g., compulsory attendance provisions), the Constitution, and the language of various Supreme Court decisions.

The real controversies in this area involve not so much what elements of a fair procedure should be required, but rather the point in time when they should attach. Most existing procedures, including those spawned by the Boston and Philadelphia lawsuits, recognize the distinction between "short term" and "long term" suspensions,and provide for the full panoply of due process safeguards in the latter. The rationale for the distinction stems from the view that high school principals should have available a disciplinary tool which can be employed on the spot without the necessity of notice or hearing. Such short term suspensions are typically limited to five days. Because it is rare that the maintenance of school order depends on the immediate removal of a student, because such short term suspensions account for most high school disciplinary actions, and because the procedure is often abused by adding one short term suspension on top of another, there is a strong argument that all the procedural safeguards should apply before any student is denied access to school for any length of time, with exceptions for emergency situations only.

Some recent cases support this view. In Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416 (W.D. Wisc. 1969), students were suspended from the University of Wisconsin for allegedly "occupying" a university building. The court held that except in a clear emergency the students had a right to a prior hearing: "Unless the element of danger to persons or property is present, suspension should not occur without specification of charges, notice of hearing, and hearing," and that all of these elements "must constitutionally precede the imposition of the sanction . . . ." 297 F. Supp. at 420.

In Stricklin Judge Doyle did not reach the question of whether due process requires a prior hearing for a "short term" suspension, but other cases have so held. In Black Students ex rel Shoemaker v. Williams, 317 F. Supp. 1211 (M.D. Fla. 1970), where 100 black students were suspended for 10 days for allegedly participating in a "walk-out," the court held that a 10 day suspension from high school requires a prior hearing. And in Sullivan v. Houston Independent School District, 333 F. Supp. 1149, 1176 (S.D. Tex. 1971), the court held that a prior hearing must be afforded a student for any suspension "which is not specifically limited to three days or less at the time of imposition." See also Williams v. Dade County School Board, 441 F.2d 229 (5th Cir. 1971).

The Sullivan case is not only a strong one for the right to a hearing. It also contains an excellent discussion of the propriety of the "suspension" device itself, strongly condemning it.

The suspension is, the court says, in effect, an easy "out" for school officials who simply would rather put the student "out" than attempt to deal with him as a human being. Far from solving anything, such a procedure stigmatizes a student, causes him to miss school and get behind in his work, and thus serves only to aggravate any problem a student might have. This discussion on pages 1171-76 of the opinion should be very valuable to legal services attorneys in persuading a court that even short term suspensions are serious matters.

Except in the cases of compounded short-term suspensions, students are rarely expelled completely from a school system. As was the case in Boston, the disciplinary transfer -- to another school or to a special school -- is commonplace. The distinction between an expulsion and a transfer should not be used to justify an arrangement providing for a fair hearing in one case and not in the other (as in the Madera case in New York, since rendered obsolete by a state statute). Hearings must be provided whenever a student is denied, for disciplinary reasons, access to a school he otherwise has a right to attend.

As mentioned, lawyers can often take a hand in drafting disciplinary procedures for local school authorities. The Oakland Lawyers' Committee Project, for example, has recently recommended extensive revisions to the Oakland School Board's disciplinary code, including a provision for establishing school-site disciplinary committees with student and parent representation. The proposal also contains provisions dealing with the role of police in the schools, corporal punishment, and drugs, as well as detailed procedures for suspensions and expulsions. The Youth Law Center has done much the same thing in San Francisco, recommending that on-site mediation committees be established in all schools to deal with a whole range of disciplinary problems. Both proposals work within the framework of existing California statutes dealing with suspension procedures. (Copies of both proposals are available from the Center in the Student Code packet.)

The Clearinghouse Review article on due process for high school students and the article on Student Codes, which are reprinted below, summarize and analyze the case law in the due process area and the various student codes which have resulted.

IV. MARRIAGE AND PREGNANCY

A. Johnson v. Board of Education of the Borough of Paulsboro, Civil Action No. 172-70 (D.C.N.J., April 14, 1970): Plaintiff's Brief, Court Order.

B. Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (1969): Plaintiff's Trial Memorandum.

C. N.Y. School Board Memorandum on the Education of Pregnant Students.

D. Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971): District Court Opinion; Letter from Plaintiff's Lawyer to State Dept. of Education; State Dept. of Education Response.

E. Michigan Compiled Laws Annotated, Secs. 388. 391-94 (Supp. 1971).

Plaintiffs in the Johnson case were challenging a formal school board policy under which "any married student or parent shall be refused participation in extra-curricular activities." Plaintiffs' attorneys argued that the policy violated the First Amendment rights of freedom of expression and association, the Equal Protection and Due Process clauses of the Fourteenth Amendment, and the penumbral right of privacy which has been inferred from the Ninth Amendment.

There was no written opinion in Johnson, but counsel for plaintiffs' analysis indicates that the trial judge stated that he was striking down the school board policy on Equal Protection grounds. He held that the rule bore no reasonable relationship to legitimate school purposes. As the analysis points out, however, the judge rejected only the particular moral justifications for the rule which the school board cited in its argument, thereby implying that there could exist some moral justification for such a rule. Such a view is contrary to the thrust of recent cases, notably Tinker. As has been emphasized, the extent of constitutional rights guaranteed to students is no longer solely a function of school officials' ability to find any reasonable justification for their policies. Disruption in the educational process must occur when a deprivation of an educational right occurs. The desire to prevent moral contamination is not, itself, enough.

Even when educational reasons are put forth to justify school policy (such as the contention in Johnson that restrictions on married students' extra-curricular activities were necessary to maintain a high academic standing), there must be a reasonable relation between the education goal and the policy itself. The Johnson rule assumed a direct correlation between marriage and academic performance and could well have been struck down for overbreadth on those grounds. Further, the rule assumed that grade-measured academic performance was educationally more valuable than extra-curricular activities. The brief presents good counter-arguments to this position.

The school board in Johnson assumed that while there may exist a right to attend school, participation in extra-curricular activities was a privilege -- a privilege whose denial could be accomplished without regard for constitutional considerations. The brief dispels the distinction. The argument presented on this point is applicable to a whole range of students rights cases in which students are not denied an education entirely, but only some part of the total educational experience. Male students being barred from participation in athletics because of behavior or appearance is commonplace. As the brief points out, "the distinction completely disregards the fact that, like scholastic activities, extra-classroom activities are funded by the state by means of its taxing power as a significant aspect of the educational process."

The Perry case challenged a school policy which automatically barred pregnant girls and unwed mothers from school. The court ruled narrowly that the exclusion of unwed mothers without a hearing violated Due Process. The opinion, however, made it "manifestly clear that lack of moral character is certainly a reason for excluding a child from public education." The court went on to concede that "the fact that a girl has one child out of wedlock does not forever brand her as a scarlet woman undeserving of any chance for rehabilitation or the opportunity for future education."

Even though the plaintiff in Perry may have eventually been reinstated, the approach taken by the court is too narrow. The possibility of an unwed mother "morally contaminating" her fellow students cannot, absent a verifiable disruption in school activities, serve as a justification for an expulsion from school. The brief also convincingly argues that the failure to exclude unwed fathers violates the Equal Protection clause.

The court had no problems with the policy of excluding pregnant girls. "The purpose for excluding such girls," it said, "is practical and apparent." In light of recent student rights decisions in other areas, however, such procedures may not appear as practical and apparent as they once did. They may well be unconstitutional.

School authorities not only have a legal obligation not to discriminate against pregnant girls by denying their right to attend regular classes, they may also be obligated to provide special services to such students once it becomes unadvisable, for health reasons, for them to attend ordinary sessions. Many jurisdictions have set up such programs. The New York City School Board memorandum reflects a policy which is a far cry from the automatic exclusion procedure (a la the Perry case) which existed in that city only a few years ago.

Finally, in Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971), a District Court squarely held that an unwed pregnant girl could not be excluded from regular high school classes because of pregnancy. The defendant school officials did not assert, as was alleged in Perry, that the girl's presence would "contaminate" other students "morally." Rather they attempted to justify the exclusion as in the best interest of the plaintiff herself. But the plaintiff presented medical and other expert testimony that participation in regular school activities would do no harm to the plaintiff or her unborn child and that, conversely, exclusion would probably cause harm. The court held that "it would seem beyond argument that the right to receive a public school education is a basic personal right or liberty" and that it could not be infringed upon in the absence of substantial medical or other justification.

One of the basic problems in the students rights area is that a court victory only applies to the named defendant, which is usually only an individual school district. Meanwhile, the rights won in court against one district may have no protection in the many other school districts in the state. The materials which follow the Ordway decision illustrate one possible method of trying to broaden the impact of a case.

Plaintiff's attorney wrote to the Massachusetts Commissioner of Education urging him, pursuant to his duty to enforce all the "laws" relating to public school education, to write a guideline letter to all school districts informing them of the substance of the Ordway decision and urging them to comply with the decision as the law of the jurisdiction. This was done and no exclusions based on pregnancy have been reported in Massachusetts since that time. The opinion-letter to the Commissioner and his letter to school districts are reprinted below.

Lastly, we have reprinted a recently passed Michigan statute which prohibits exclusion from high school based on pregnancy. Hopefully, similar efforts to pass legislation protecting student rights can be made in other states.

V. THE POLICE AND THE SCHOOLS

A. Overton v. New York, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969), adhered to, 311 F. Supp. 1035 (S.D.N.Y. 1970): Memorandum of Law in Support of Petition for Habeas Corpus.

B. What Constitutes Your Right to Privacy on Campus, by Roy Lucas.

C. Howard v. Clark, 59 Misc. 2d 327, 299 N.Y.S.2d 65 (N.Y. Sup. Ct. 1969): Complaint, N.Y. Supreme Court Decision.

D. Piazzola v. Watkins, 442 F.2d 284 (5th Cir. 1971).

The Overton case involves the extent of Fourth Amendment search and seizure protections in high schools. At each step in its rather prolonged history (see habeas petition), the authority of the Vice Principal of Mount Vernon High School to consent to the search by police of student lockers has been upheld. (The officers possessed a warrant which was later held to be invalid.)

The New York State courts which originally ruled in Overton seemed to be clinging to a notion that, until recently, has pervaded judicial rulings in the high school student rights cases: since school officials are acting in loco parentis, they have the authority to waive constitutional safeguards which have been held applicable to "real people" in the "real world." The New York Court of Appeals appears to have retained this notion even after the case was remanded by the U.S. Supreme Court for consideration in light of Bumper v. North Carolina, 391 U.S. 545 (1968), which held that a valid consent to search cannot be given when the consenter has been presented with a presumably valid search warrant.

The Roy Lucas memo on "What Constitutes Your Right to Privacy on Campus" offers extensive case support for high school search cases.

The plaintiffs in the Howard case were suspended from school after being arrested off school grounds and charged with possession of narcotics. The action was taken under a local school board regulation providing for automatic suspension in such cases.

The court did not rule on any of the Equal Protection or Due Process issues raised, nor did it question the constitutionality of the New York State statute setting out the grounds for suspension. Instead, it held simply that the New Rochelle School Board had exceeded its authority under the state statute. No brief was filed in Howard, but the constitutional arguments are outlined in the complaint.

Since Overton, several courts have extended varying degrees of Fourth Amendment protection to the dormitory rooms of college students, and while this is not quite the same as a high school student's locker, there are strong arguments for extending the rationale of the college cases to the high school situation, as indicated below.

Reprinted here is the recent Fifth Circuit case of *Piazzola v. Watkins*, 442 F.2d 284 (1971), written by Judge Richard T. Rives. It was Judge Rives who wrote for the Fifth Circuit in *Dixon v. Alabama*, the leading case for the right of students to due process of law and fair procedures before being expelled or suspended from school. *Dixon*, though a college case, became the basis for later cases protecting the due process rights of high school students. Similarly, *Piazzola* is a college case, but promises to become the leading Fourth Amendment case for high school as well as college students.

In *Piazzola*, the Dean of Men at Troy State University was informed by local police that they suspected certain students of possessing marijuana in their college dormitory rooms. The police requested and obtained University cooperation in the search. University officials gave police access to the rooms and participated with the police in the searches of six or seven dormitory rooms. Marijuana was found in the rooms of two students, who were subsequently prosecuted and sentenced to five years in prison. The case reached the federal courts through habeas corpus petitions by the two students.

The defendents attempted to justify the search, conducted without a warrant, on the basis of a regulation in which the college "reserved" the right to inspect dormitory rooms and to search them "when deemed necessary."

Citing *Katz v. United States*, 389 U.S. 347 (1967), and other cases which hold that the Fourth Amendment protects *people*, rather than places, from "unreasonable searches," the court argued that college students should not be deemed to surrender their Fourth Amendment rights simply because they happen to live in college-owned facilities. True, the University could exercise some supervisory power over college dormitory rooms in furtherance of the "university's function as an educational institution." But in the present case school officials had consented to a search by the police whom they knew were primarily concerned with gathering evidence for a criminal prosecution. The court held:

> The regulation cannot be so construed or applied so as to give consent to a search for evidence for the primary purpose of a criminal prosecution. Otherwise, the regulation itself would constitute an unconstitutional attempt to require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room. Compare *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969) ...*Clearly the University had no authority to consent to or join in a police search for evidence of a crime*. (Emphasis added.) *Piazzola*, at 289-290.

(The cite to p. 506 of *Tinker* is clearly a reference to the statement "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of expression at the schoolhouse gate.")

Two other cases have extended similar Fourth Amendment protection to college students, and are discussed in the text of the *Pizaaola* case: *People v. Cohen*, 57 Misc.2d 858, 306 N.Y.S.2d 788, and *Commonwealth v. McCloskey*, 217 Pa. Super. 432, 272 A.2d 271 (1970).

These arguments should be applicable to school officials' consent to, and participation in, an otherwise illegal search of a high school student's locker, desk or other private area assigned to the student. For example, in Overton, a student's locker was opened and his coat was searched for marijuana. Like Piazzola, school officials knew that the whole purpose of the police search was to obtain evidence of a crime. Clearly, if a high school student is simply walking down the street his coat cannot be searched by police without a warrant or probable cause. But students are in high school because state law requires them to be there, and they necessarily have to store their coats some place. In most schools, lockers are supplied for that purpose. To allow a warrantless police search in these circumstances is, in effect, to provide by law for a situation in which students automatically surrender their Fourth Amendment rights at the whim of police officers or school officials. If, as Tinker has held, students do not shed their First Amendment rights at the schoolhouse gate, it seems incongruous that they should surrender the right to privacy they would otherwise have. As Judge Rives stated in Piazzola, "The right to privacy is no less important than any other right carefully and particularly reserved to the people." Mapp v. Ohio, 1961, 357 U.S. 643, 657 .." 442 F.2d at 290.

VI. CORPORAL PUNISHMENT

A. Complaint in Murphy v. Kerrigan, C.A. No. 69-1174-W (D. Mass.), settled by stipulation, June 3, 1970.

B. Memorandum of Law in Hernandez v. Nichols, No. C-70-800-RFD (N.D. Cal., filed April 16, 1970); TRO.

C. Note, Corporal Punishment in the Public Schools, 6 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 583 (1971).

D. Additional Cases.

Murphy v. Kerrigan challenged corporal punishment in the schools broadly as a policy violative of the due process guarantee of the Fourteenth Amendment and the Eighth Amendment's prohibition against "cruel and unusual punishment." It also argued that the lack of standards for the imposition of such punishment, and the lack of fair procedures prior to imposition of such punishment, violated due process. Included in the papers is a model procedure for dealing with grievances against teachers. The case ended with a consent decree by which the Boston School Committee agreed to ban corporal punishment in the Boston public schools. The decree expressly stated, however, that it was binding only for the duration of the term of the School Committee members in office at the time of the settlement.

The memorandum in Hernandez v. Nichols presents arguments for challenging corporal punishment solely on procedural due process grounds.

The law review note, Corporal Punishment in the Public Schools, argues that courts should find corporal punishment cruel and unusual and a denial of due process of law. It incorporates ideas expressed in a draft of "Cruel and Unusual Punishment in Corporal Punishment Cases" by Carolyn Peck, a former Center attorney. Eighth Amendment challenges are considered in light of whether the punishment constitutes "civilized treatment" and whether it is clearly excessive. Alternatively, corporal punishment in the public schools may be unconstitutional for violating the due process clause of the Fourteenth Amendment. The punishment is viewed as an infringement on the fundamental interest of physical integrity. The argument is that courts should test corporal punishment against a standard similar to that applied in cases involving search and seizure of the person.

The final materials in this section describe recent cases which have been filed. Most of them pose arguments similar to those in Murphy. David Gil's book, Violence Against Children, the most current work on corporal punishment, is also recommended.

VII. PROBLEMS OF STUDENT DISCIPLINE AND CLASSROOM CONTROL, by Roy Lucas.

This outline of source material on student rights questions was prepared for the spring conference of the National Association of Teacher Attorneys, held May 5, 1970.

VIII. SUITS FOR DAMAGES IN STUDENT RIGHTS CASES

A. Recent cases granting positive relief.

B. Suits for damages under the federal civil rights statutes.

C. College Law Bulletin report on Greene v. Ware, Civ. Act. No. C-313-70 (C.D. Utah, Dec. 8, 1971).

Claims for damages provide an increasingly useful form of relief in student rights cases. In Pyle v. Blews, No. 70-1829-JE (S.D. Fla. March 29, 1971), the student plaintiff received $100 compensatory damages and costs after being expelled for long hair. The court ordered that his record be cleared and that no other students be suspended for long hair. In Tizekker v. Taylor (Fla. Cty. Ct., Feb. 1972), $18,500 in punitive damages were awarded a student who had been caned by his school principal. The attorney showed the punishment to be totally disproportionate to the student's offense of being one hour late for school.

Nearly every right that has been brought within the due process clause of the Fourteenth Amendment has also been the subject of a suit for damages under the civil rights statutes. See Niles, Civil Actions for Damages Under the Federal Civil Rights Statutes, 45 TEX. L. REV. 1015 (1967).

Greene v. Ware involves a student leafletting in protest against a fund-raising dinner for Vice President Agnew. Although he had complied with university leafletting regulations, he was arrested by university police and searched. Under a § 1983 action the judge ruled that there had been a false arrest and the jury awarded general ($1,000) and punitive ($4,000) damages.

IX. FREEDOM OF INFORMATION

A. The right to view, challenge, or control student's school records.

B. The right to receive information about the overall operation of a school or school system.

Although over thirty states have some form of freedom of information legislation, the statutes are often weak or do not apply to school matters. If a student or parent desires access to information allegedly serving as a basis for school action against the student, attorneys should assert a right to see and challenge all school records concerning the student. Van Allen v. McCleary, 211 N.Y.S.2d 501 (1961), held that a parent has a common law right to inspect his child's school records. The New York State Commissioner of Education took a significant step further on February 25, 1972 in ruling that even unofficial school records such as teachers' comments or guidance notes should be accessible to parents. Courts have upheld students' rights to see and challenge recommendations to college admissions offices, but schools' rights to include disciplinary material in such recommendations have also been upheld.

In some cases, attorneys may seek general information about a whole school or school system, such as racial composition, test scores, tracking, college access, financial data, and addresses of students or school personnel. Data not readily accessible may be easy prey for interrogatories, subpoenas and other discovery devices. The materials list cases outlining pertinent situations involving access to information.

I.FREEDOM OF EXPRESSION

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RAYMOND SCOVILLE, a minor, and MERRILL
SCOVILLE, as father and next friend;
ARTHUR BREEN, a minor, and JERRY BREEN,
as father and next friend,

Plaintiffs

v

BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH
SCHOOL DISTRICT 204, COUNTY OF WILL, STATE
OF ILLINOIS; ARTHUR L. BRUNING, DAVID R.
ROSS, HOWARD JOHNSON and CLAYTON WINTERSTEEN,

Defendants

CIVIL ACTION
FILE NO.

EQUITABLE and
DECLARATORY RELIEF
and DAMAGES SOUGHT

COMPLAINT

1. This action is for interlocutory and permanent relief for delcaratory judgment and for damages. This court has jurisdiction by authority of Titles 42 U.S.C., Sec. 1983, 28 U.S.C., Sec. 1343, 28 U.S.C., Sec. 2201 and 28 U.S.C., Sec. 2202.

2. Plaintiff RAYMOND SCOVILLE is a minor, 17 years of age, a citizen of the United States and the State of Illinois, and resides with his parents at 925 Oakland Avenue, Joliet, Illinois. (RAYMOND SCOVILLE is hereinafter sometimes referred to as "minor plaintiff".) Plaintiff MERRILL SCOVILLE is the father and next friend of minor plaintiff RAYMOND SCOVILLE, and is also a citizen of the

United States and the State of Illinois and resides at 925 Oakland Avenue, Joliet, Illinois.

3. Plaintiff ARTHUR BREEN is a minor, 17 years of age, a citizen of the United States and the State of Illinois, and resides with his parents at 655 Ross, Joliet, Illinois. (ARTHUR BREEN is hereinafter sometimes referred to as "minor plaintiff".) Plaintiff JERRY BREEN is the father and next friend of minor plaintiff ARTHUR BREEN, and is also a citizen of the United States and the State of Illinois and resides at 655 Ross, Joliet, Illinois.

4. Defendant, BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH SCHOOL DISTRICT 204, COUNTY OF WILL, STATE OF ILLINOIS (hereinafter called "JOLIET SCHOOL BOARD"), a a body corporate and politic created by Ill. Rev. Stats., Ch. 122, Sec. 10-1 et seq. and at all times referred to herein, so endowed by said Statute with the right to sue and be sued; and also so empowered to administer public education in the City of Joliet, Illinois, and in particular at a high school known as JOLIET TOWNSHIP HIGH SCHOOLS-CENTRAL CAMPUS (hereinafter called "JOLIET CENTRAL".) At all times referred to herein, defendant ARTHUR L. BRUNING was the Superintendant of the three high schools, including JOLIET CENTRAL, which were administered by the JOLIET SCHOOL BOARD; defendant DAVID P. ROSS was the principal of JOLIET CENTRAL; defendant HOWARD JOHNSON was the junior dean of JOLIET CENTRAL, and defendant CLAYTON WINTERSTEEN was the senior dean of JOLIET CENTRAL.

5. Prior to February 23, 1968, minor plaintiffs were enrolled in the regular day school session at JOLIET CENTRAL, were above average students, were members in good standing of the junior class,

were active in extra curricular activities, and were entitled to attend said high school pursuant to the laws of the State of Illinois, for the purpose of obtaining a free public education.

6. Prior to January 31, 1969, minor plaintiff RAYMOND SCOVILLE was the literary editor of the high school newspaper published by JOLIET CENTRAL.

7. Prior to January 20, 1968, minor plaintiffs were both members of the debating team at JOLIET CENTRAL.

8. The rights and powers to discipline students such as minor plaintiffs are set forth in the Illinois School Code, Ill. Rev. Stats, Ch. 122, Sec. 10-22.6 (1967) which provides that a school board such as JOLIET SCHOOL BOARD, shall have the power:

> "(a) to expel students guilty of gross disobedience
> or misconduct. . ." (emphasis supplied)

9. Prior to January 15, 1968, minor plaintiffs conceived and published a literary journal known as "Grass High" for the purpose of providing a means by which creative writing talents among students at JOLIET CENTRAL could be displayed and appreciated by students and faculty at JOLIET CENTRAL.

10. On January 15, 1968, minor plaintiffs distributed 60 copies of the first edition of "Grass High" at a price of 15 cents per copy. A true and correct copy of said first edition is attached hereto and incorporated herein as Exhibit I. Said distribution was made to faculty and students at JOLIET CENTRAL. Where said distribution was made in class rooms at JOLIET CENTRAL it was done with the express or implied consent of the teachers in whose rooms said publication was distributed. At no time did said distribution create a disturbance which did, or could have caused, any commotion or disruption of classes at JOLIET

CENTRAL. On January 15, 1968, and at no time prior thereto, were minor plaintiffs asked to desist from such distribution by any member of the faculty or administration at JOLIET CENTRAL; or by any of the defendants.

11. On January 18, 1968, during the second day of final examinations for the Fall semester, 1967/1968, minor plaintiffs were instructed not to report for their scheduled examination but rather to defendant, CLAYTON WINTERSTEEN, senior dean. Minor plaintiffs did report to said defendant, CLAYTON WINTERSTEEN, and were then and there threatened by defendant, CLAYTON WINTERSTEEN, with retribution for their publication of the journal "Grass High."

12. On January 20, 1968, minor plaintiffs were informed by PAUL HAYWOOD, a teacher at JOLIET CENTRAL, that they would no longer be permitted to participate in any debate team activity because of their publication of "Grass High."

13. On January 22, 1968, minor plaintiffs were suspended from classes for the first five (5) days of the Spring 1968 semester at JOLIET CENTRAL.

14. On or about January 31, 1968, defendant DAVID R. ROSS sent to plaintiff MERRILL SCOVILLE and JERRY BREEN and to defendants ARTHUR L. BRUNING and HOWARD JOHNSON, a memorandum purporting to set forth certain "charges" against the minor plaintiffs resulting from their distribution of the journal, "Grass High"; said memorandum recommended that minor plaintiffs be expelled from JOLIET CENTRAL for the remainder of the school term ending June, 1968.

15. Subsequent to January 31, 1968, defendants DAVID R. ROSS, HOWARD JOHNSON and ARTHUR L. BRUNING did recommend to defendants

JOLIET SCHOOL BOARD that minor plaintiffs be expelled from JOLIET CENTRAL for the remainder of the term ending June, 1968.

16. On January 31, 1968, minor plaintiff RAYMOND SCOVILLE was notified by defendants that he was no longer to be considered an editor of the high school newspaper.

17. On or about February 6, 1968, plaintiff MERRILL SCOVILLE and plaintiff JERRY BREEN received a letter from defendant ARTHUR L. BRUNING stating that he would recommend the expulsion of the minor plaintiffs from JOLIET CENTRAL at the meeting of the defendants JOLIET SCHOOL BOARD on February 13, 1968; a true and correct copy of the text of said letter is attached hereto and incorporated herein as Exhibit 2.

18. On February 23, 1968, at a meeting of said defendant JOLIET SCHOOL BOARD, defendant JOLIET SCHOOL BOARD expelled the minor plaintiffs for the remainder of the school term ending June, 1968. Said order of expulsion was contained in a Resolution, a true and correct copy of which is attached hereto and incorporated herein as Exhibit 3.

19. Neither minor plaintiffs nor plaintiff MERRILL SCOVILLE nor plaintiff JERRY BREEN nor any of their representatives attended said meeting. Rather than attend said meeting, plaintiff MERRILL SCOVILLE and plaintiff JERRY BREEN sent a letter to each member of defendant, JOLIET SCHOOL BOARD, which set forth plaintiffs' position. A true and correct copy of the text of the letter sent by plaintiff, MERRILL SCOVILLE is attached hereto, and incorporated herein as Exhibit 4.

20. As a result of said expulsion, minor plaintiffs were forced to complete their studies at the night school session of JOLIET CENTRAL except for the one course which minor plaintiffs were allowed to continue during the regular day session of JOLIET CENTRAL. Plaintiffs were required to pay approximately $40.00 for tuition for said night school courses though no tuition was charged for their regular day school sessions in which plaintiffs were enrolled prior to their expulsion. Further, minor plaintiffs were required to purchase books and materials for said night school courses in addition to books and materials which minor plaintiffs were required to have previously purchased for the regular classes at JOLIET CENTRAL. Further, the quality of education which plaintiffs have and will continue to receive at said night school session is substantially inferior to the quality of education which the minor plaintiffs would receive during the regular day sessions of JOLIET CENTRAL.

21. On or about Feburary 26, 1968, defendant DAVID R. ROSS informed minor plaintiffs that minor plaintiffs could expect bad recommendations for college applications. Further, defendant, DAVID R. ROSS stated that if minor plaintiffs were to publish another edition of "Grass High" it would mean an end to night school courses and the one day school course in which minor plaintiffs had been allowed to enroll.

22. The action of defendants in expelling minor plaintiff RAYMOND SCOVILLE and minor plaintiff, ARTHUR BREEN, was invalid and illegal in that it violated the First and Fourteenth Amendments to the Constitution of the United States of America for reasons that the standards by which minor plaintiffs were expelled:

(a) were applied by defendants in a manner which was arbitrary and unreasonable and deprived minor plaintiffs of their rights of free speech and free press. Defendants' threatened action will also deprive minor plaintiffs of their constitutionally protected rights;

(b) were not contained in any valid rule or regulation of defendant JOLIET CENTRAL or defendants JOLIET SCHOOL BOARD and were in excess of authority conferred upon defendants by the Illinois School Code, Ill. Rev. Stats. Ch. 122;

(c) were on their face arbitrary, unreasonable, vague, incapable of reasonable administration and without adequate guidelines for enforcement.

23. Irreparable damages have been done in the deprivation of plaintiffs' rights as set forth herein. Plaintiffs have no adequate remedy at law in that the deprivation is present and continuing and will extend into the future unless the defendants are enjoined by this court as hereinafter prayed; money damages cannot adequately compensate plaintiffs.

WHEREFORE, the plaintiffs pray that this court:

1. Delcare the action by defendants, expelling minor plaintiffs from JOLIET CENTRAL, illegal and unconstitutional.

2. Declare the standards by which minor plaintiffs were expelled, illegal and unconstitutional as applied to minor plaintiffs.

3. Pending the filing of an answer and hearing to determine this action, grant plaintiffs interlocutory injunction, without bond, and subsequently grant plaintiffs a permanent injunction:

(a) restraining the operation of said expulsion order, reinstating minor plaintiffs as full time regular session students at JOLIET CENTRAL and ordering defendants to facilitate minor plaintiffs transition into the semester currently in progress at JOLIET CENTRAL, with full academic credit; and

(b) restraining defendants, and each of them, their officers, agents, employees and representatives from in any way communicating to any school, college, university, or employer that minor plaintiffs involvement in the heretofore alleged publication and distribution of said literary journal, and the events subsequent thereto, in any way resulted in disciplinary proceedings or that said publication, distribution and subsequent events should be deemed in any way a negative reflection upon minor plaintiffs' character, reputation or qualification.

4. Order defendants to expunge the records of JOLIET CENTRAL and defendants of JOLIET SCHOOL BOARD of any evidence of any disciplinary recommendations or actions taken as a result of said publication, distribution and events subsequent thereto. In particular, that such records be expunged of the resolution of defendants JOLIET SCHOOL BOARD dated February 23, 1968.

5. Plaintiffs be awarded, as damages and costs of tuition fees by plaintiffs for said night school sessions and the costs of books and amterials which plaintiffs had bee required to purchase for said night school sessions.

6. Plaintiffs have such toher and further relief as is just.

7. Defendants pay plaintiffs' cost of this action.

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In the

United States Court of Appea

For the Seventh Circuit

No. 17190

RAYMOND SCOVILLE, a minor, and MERRILL SCOVILLE, as father and next friend; ARTHUR BREEN, a minor, and JERRY BREEN, as father and next friend,

Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH SCHOOL DISTRICT 204, COUNTY OF WILL, STATE OF ILLINOIS; ARTHUR L. BRUNING, DAVID R. ROSS, HOWARD JOHNSON and CLAYTON WINTERSTEEN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable ALEXANDER J. NAPOLI, *Trial Judge.*

APPELLANTS' BRIEF

PAUL M. LURIE
208 S. LaSalle Street
Chicago, Illinois 60604
Attorney for Plaintiffs-Appellants

Of Counsel:
FOHRMAN & LURIE
208 S. LaSalle Street
Chicago, Illinois 60604

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 17190

RAYMOND SCOVILLE, a minor, and MERRILL SCOVILLE, as father and next friend; ARTHUR BREEN, a minor, and JERRY BREEN, as father and next friend,

Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH SCHOOL DISTRICT 204, COUNTY OF WILL, STATE OF ILLINOIS; ARTHUR L. BRUNING, DAVID R. ROSS, HOWARD JOHNSON and CLAYTON WINTERSTEEN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Honorable ALEXANDER J. NAPOLI, *Trial Judge.*

APPELLANTS' BRIEF

RELEVANT STATUTES

ILLINOIS REVISED STATUTE (1967)

CHAPTER 122
(Illinois School Code)

Sec. 10-22. *Powers of the Board.*

The school board shall have the powers enumerated in sections 10-22.1 through 10-22.34 . . .

Sec. 10-22.6 *Suspension or expulsion of pupils.* (a) to expel pupils guilty of gross disobedience or misconduct, and no action shall lie against them for such expulsion. Expulsion shall take place only after the parents have been requested to appear at a meeting of the board to discuss their child's behavior. Such request shall be made by registered or certified mail and shall state the time, place and purpose of the meeting. The board at such meeting shall state the reasons for dismissal and the date on which the expulsion is to become effective. (b) To suspend or by regulation to authorize the superintendent of the district or the principal superintendent of the district or the principal of any school to suspend pupils of gross disobedience or misconduct for a period not to exceed 7 days or until the next regular meeting of the board, whichever first occurs, and no action shall lie against them for such suspension.

ISSUES

1. Plaintiffs' Complaint alleges that the distribution of their journal created no disturbance which did or could have caused any commotion or disruption of high school classes. Can the Trial Court make an irrebuttable finding on the pleadings that printed words alone can create an immediate threat to the disruption of a school system, without considering evidence of the effect of the publication?

2. Can a broad, generally worded statute, aimed at the regulation of disruptive conduct, be applied to punish the publication of a journal which has not had any disruptive effect, in the absence of a clearly drawn regulation warning that particular printed expression will be prohibited?

3. Did the Trial Court abuse its discretion in not granting plaintiff's Motion For a Temporary Injunction?

STATEMENT OF THE CASE

On April 17, 1968 minor plaintiffs, through their fathers, filed an action seeking to declare invalid under the First and Fourteenth Amendment to the United States Constitution minor plaintiffs' expulsion from a public high school solely for publishing a journal which contained criticisms of school administrators. Plaintiffs seek to enjoin the enforcement of the expulsion order and to enjoin defendant's communication to future employers or schools that plaintiffs' publication and distribution of their journal should be deemed in any way a negative reflection upon plaintiff's character, reputation or qualifications. Further, plaintiffs seek incidental damages.

On April 17, 1968, plaintiffs filed a Motion for Interlocutory Injunction, requesting plaintiffs be reinstated in the regular day-school sessions of Joliet Central and that the defendants be restrained from communicating to employers or schools comments which cast a negative reflection upon minor plaintiffs' character, reputation and qualifications as a result of their publication. On May 3, 1968, defendants filed a Motion to Dismiss Plaintiffs' Complaint on the grounds that the Complaint failed to state a claim upon which relief could be granted or in the alternative that the Court lacked jurisdiction. On May 14, 1968, defendants filed an Answer to plaintiffs' Complaint.

On July 19, 1968, the Trial Court granted defendants' Motion to Dismiss and entered judgment on the pleadings in favor of defendants and against plaintiffs. In essence, the Trial Court held that plaintiff's editorial "My Reply" (App. 13), which was critical of school administrators and school rules, presented an irrebuttable presumption of a "clear and present danger" to the "orderly maintenance of a public school system" (App. 42); this presumption was applied without consideration of the context of the language, the circumstances of the utterances, or the lack of disruptive effect on classroom activities.

Raymond Scoville and Arthur Breen (who are referred to in this Brief as the plaintiffs) were in January, 1967, aged 17 and in their junior year at Joliet Central High School. Defendant Arthur L. Bruning was the Superintendent of the three high schools administered by the Board of Education of Joliet Township, District 204, County of Will, State of Illinois. Defendant David R. Ross was the Principal of Joliet Central High School; defendant Howard Johnson was Junior Dean of Joliet Central, and defendant Clayton Wintersteen was the Senior Dean of Joliet Central High School. Both plaintiffs were above-average students and active in extracurricular activities. Plaintiffs were on the debate team and plaintiff Raymond Scoville was Literary Editor of the official high school newspaper.

Plaintiffs desired to publish a journal containing the creative efforts of themselves and their fellow students. Plaintiffs wrote and solicited material for their new journal and published it at their own cost off the school premises. The 16-page journal contained original poetry, essays, music reviews, movie reviews, short stories, graffiti, and editorial criticism of school administrators and procedures.

On January 15, 1968, plaintiffs distributed 60 copies of the first edition of their journal, Grass High (App. 10-22) among students and faculty at Joliet Central, charging a price of 15¢ per copy. Where distribution was made in classrooms, there was consent of the teachers. At no time did the distribution create a disturbance which did

or could have caused any commotion or disruption of classes at Joliet Central. Plaintiffs were never advised to cease the distribution by any teacher or administrator at the high school. Prior and subsequent to plaintiffs' distribution of the journal, there was no code of student behavior or announced student rules governing student publications or criticism of school administrators. In particular, there were no rules against criticism of school administrators or policies.

The distribution was made without incident, and for three days, no action was taken against the plaintiffs. On January 18, 1968, defendant Clayton Wintersteen advised plaintiffs that they would be punished for their publication. However, at that time no charges were made that the publication had interfered in any way with the orderly administration of classes at Joliet Central.

On January 22, 1968, plaintiffs were advised that they were suspended from high school for the first five days of the Spring, 1968 semester; still no formal charges had been made against the plaintiffs. On January 31, 1968, plaintiff Raymond Scoville was notified by defendants that he was no longer an editor of the high school newspaper. On February 6, 1968, plaintiffs' parents received a letter from defendant Arthur Bruning stating that he would recommend to the School Board that plaintiffs be expelled for the remainder of the school term:

> "Serious misbehavior in the form of public use of objectionable language and the publication and in-school sale of inappropriate statements about school staff members require stern action on our part." (Complaint Exhibit 2, App. 23).

The letter to plaintiff Raymond Scoville's parents ended: "Raymond is a bright and talented young man, and we are anxious to see him re-establish his potential through a renewed responsibility and commitment." (Complaint Exhibit 2., App. 23).

On February 23, 1968, at a meeting of the defendant School Board, a Resolution of Expulsion was passed finding that plaintiffs were guilty of "gross misconduct" and "gross disobedience" within the meaning of the Illinois School Code, Sec. 10-22.6 for the reason that plaintiffs' preparation and distribution for sale of Grass High:

"(1) Constitutes a public use of inappropriate and indecent language,

(2) Constitutes a violation of established rules of said School District,

(3) Constitutes a disregard of and contempt for authorities charged with the administration of said Central Campus and said School District,

(4) Encourages the disregard and disobedience of orders promulgated by the duly constituted authorities of said Central Campus and said School District,

(5) Involves other students as parties to the preparation and distribution of the aforesaid writing who were, in fact, not parties thereto;" (Complaint Exhibit 3., App. 24).

As a result of said expulsion, plaintiffs were forced to complete their studies for the Spring, 1968 semester in night school except for the one course which plaintiffs were allowed to continue during the regular day-session. Plaintiffs were required to pay approximately $40.00 for tuition for the night-school courses, though no tuition was charged for their regular day-school sessions. Plaintiffs were required to purchase books and materials for the night school courses in addition to books and materials which they were required to have previously purchased

for the regular classes at Joliet Central High School. The quality of education which they received at the night school session was substantially inferior to the quality of education which they would have received during the regular day sessions at Joliet Central High School.

On February 26, 1968, defendant David Ross informed plaintiffs they could expect bad recommendations for college applications as a result of their publication of Grass High. Further, David Ross threatened plaintiffs that if they were to publish another edition of the journal, it would mean an end to night school courses and the one day-school course in which plaintiffs had been allowed to enroll.

SUMMARY OF ARGUMENT

The sole basis for the Trial Court's decision was plaintiffs' critical editorial "My Reply" case. There is nothing in the record below to indicate that plaintiffs' comments disrupted the presentation of classroom activities.

Under the rules of *Burnside* v. *Byars*, 363, F. 2d 744 (5th. Cir., 1966) and *Pickering* v. *Board of Education*, 20 L.Ed. 2d 811 (1968), the only state interest which defendants could assert to be paramount to plaintiffs' right of free press was defendants' right to prevent disruption of classroom activities. There was no evidence of an invasion of such state interest before the Trial Court. In addition, the Trial Court's determination that plaintiffs' journal threatened the entire school system is wholly without support in the Resolution of Expulsion. (App. 24, 25).

The Trial Court considered certain words used in plaintiffs' editorial "My Reply" as *per se* an immediate and serious enough danger to the "orderly maintenance of a public school system" to justify the suppression of First

Amendment freedoms. (App. 39). The Trial Court made this determination that plaintiffs' publication was unprotected without hearing any evidence of how this meager journal distributed to 60 of thousands of students threatened to jeopardize the entire Joliet school system. Most importantly, the Trial Court failed to consider the evidence necessary to balance the importance of the state interest threatened, with the importance for creative expression and criticism in high schools, with the probability the speech will actually disrupt the school system, and with the availability of more moderate controls than those the state was attempting to justify.

The United States Supreme Court has rejected the use of irrebuttable presumptions which preclude careful consideration and balancing of factors where First Amendment freedoms are attempted to be suppressed. *Wood* v. *Georgia*, 370 U.S. 375 (1962).

At the time of plaintiffs' expulsion, there were no announced rules or regulations prohibiting plaintiffs' journal or the words contained therein. In order to justify plaintiffs' expulsion, defendants have attempted to apply the broad language of the Illinois School Code which prohibits "gross misconduct" or "gross misobedience" to punish pure speech which does not involve disruptive conduct. In the absence of a clearly drawn regulation giving adequate notice of the prohibited unlawful activity, constitutional standards will not permit suppression of protected expression by vague, broad, and general laws. *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), *Cox* v. *Louisiana*, 379 U.S. 536, 559 (1965).

ARGUMENT

I. THE SCHOOL COULD ONLY LIMIT LITERATURE WHICH PRESENTED AN IMMEDIATE AND SUBSTANTIAL THREAT TO THE PRESENTATION OF CLASSROOM MATERIAL.

If plaintiffs' journal had not been distributed on school grounds and had not been critical of defendants, their editorial comments would have been constitutionally protected.[1] As the Trial Court admitted:

> "[R]esponsible criticism of school administrative officials is no less protected by the First Amendment
>
> than responsible criticism of other state officials . . . "[O]n a street or on a public park, . . . the rights of free speech are virtually absolute." (App. 41, 42)

The Trial Court held that because plaintiffs were students and their journal was distributed in the school, their speech was not protected by the constitutional standards otherwise available to them as citizens. However, the only state interest peculiar to the student-school relationship which may be paramount to First Amendment rights is the administrators' right to limit conduct which is disruptive of the presentation of classroom materials. *Burnside* v. *Byars*, 363 F. 2d 744 (5th Cir. 1966), *Pickering* v. *Board of Education*, 20 L.Ed. 2d 811 (1968). *Burnside* v. *Byars*, which the Trial Court cited as authority, held that high school administrators cannot expel students for expression which does not under the circumstances of its publication materially and substantially interfere with the orderly presentation of classroom materials. 363 F. 2d 744, 748. Students cannot be expelled from peacefully-made expression with which the administrators disagree:

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[1] Nothing contained in the journal posed a threat to the right of government to maintain its existence. *Schenck* v. *U. S.*, 249 U.S. 47 (1918); *Dennis* v. *U.S.*, 341 U.S. 494 (1951); nor to the right of government to conduct its normal function. *Cox* v. *Louisiana*, 379 U.S. 559 (1965). The words used were not recklessly or knowingly libelous of public officials under the standards of *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); the words did not pose a threat to a breach of the peace as they did under the circumstances of *Feiner* v. *New York*, 340 U.S. 315 (1951); nor were the words obscene under the standards of *Roth* v. *U.S.*, 354 U.S. 476 (1957) and *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966); or *Ginzburg* v. *U.S.*, 383 U.S. 463 (1966).

> "[W]e must also emphasize that school officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." 363 F.2d 744, 749.

In *Burnside* v. *Byars*, the defendant high school administrators had determined that the wearing of certain slogan buttons would '"cause commotion [and] be disturbing [to] the school program by taking up time to get order, passing [the buttons] around and discussing them in the classrooms and explaining to the next child why they were wearing them."' 363 F. 2d 744, 747. Pursuant to this finding, and the general authority to discipline as contained in a student handbook,[2] the principal announced

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[2] No such code of student behavior or regulation forbidding plaintiffs' conduct existed at the time plaintiffs

that the slogan buttons would not be permitted to be worn on the school premises. After this clear warning, plaintiffs deliberately wore the buttons and were expelled for this exercise of expression.[3] Plaintiffs brought suit for reinstatement pursuant to Title 42 U.S.C. 1983 and Title 28 U.S.C. 1343. The District Court denied a preliminary injunction and plaintiffs appealed.

The Circuit Court of Appeals not only reversed, but held that the District Court had abused its discretion in not granting the injunction. The Fifth Circuit found that plaintiffs' activity had not interfered with the learning process and the mere presence of slogan buttons was not sufficient to justify the harsh punishment invoked against these children. As in the instant case, defendants in *Burnside* v *Byars* contended that their actions were reasonable to maintain proper discipline in the school. The Appellate Court disagreed and held that the only rules which will be permitted to infringe upon First Amendment rights are those "necessary for the orderly presentation of classroom activities."[4] 363 F. 2d 744, 748. The Court illustrated constitutionally permissible rules: those assigning students to particular classes, those forbidding unnecessary discussion in the classroom and those prohibiting the exchange of conversation between students. 363 F. 2d 744, 748.

---

[3] In the instant case, plaintiffs were not warned that they were engaging in unlawful activity.

[4] *Contra. Tinker* v. *Des Moines Independent Community School District*, 258 F. Supp. 971 (S.D. Iowa, 1966) affirmed by an equally divided court sitting en banc, 383 F. 2d 988 (8th Cir., 1967). The Trial Court adopted a view that a rule forbidding the wearing an anti-war arm bands was reasonable even if there was no material or substantial interference with classroom activity. The Supreme Court has granted certiorari 390 U.S. 942 and oral arguments have been made

Pickering v. *Board of Education,* 20 L. Ed 2d 811 (1968) involved the suspension of a high school teacher for a letter which Pickering had written to a local newspaper critical of the school administrators. In *Pickering,* the school administrators contended that the fact the petitioner-teacher participated in the education of youngsters justified suppression of criticism of superiors. The Illinois Supreme Court, whose judgment was reversed relied on just such a ground:

> "Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of teaching position in the public schools obliged him to refrain from making statements about the operation of the schools "which in the absence of such position he would have an undoubted right to engage in." 20 L. Ed. 2d 811, 816.

The U. S. Supreme Court reversed, holding that:

> "What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." 20 L. Ed. 2d 811, 819-20.

II. WHETHER PLAINTIFFS' JOURNAL CREATED SUBSTANTIAL AND IMMEDIATE DANGERS TO THE PRESENTATION OF CLASSROOM MATERIALS IS A FACTUAL ISSUE REQUIRING A BALANCING OF FACTORS.

1. The Factors To Be Balanced.

Freedom of the press is a "preferred freedom" and the state has the burden to prove a substantive interest to justify suppression. *Wood* v. *Georgia,* 370 U. S. 375, 386 (1962).

Freedom of expression and especially freedom to publish have important functions in a democratic society, where "official truth" is a relative and constantly evolving concept. In our society we believe that "free debate of ideas will result in the wisest governmental policies" *Dennis* v. *U. S.,* 341 U. S. 494, 503, (1951), and will "keep a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart." *Dennis* v. *U. S., supra,* 341 U. S. at p. 584. (Douglas, dissenting.)

As a result of the principle of the "preferred position" of expression, speech may be limited only when after all the circumstances of the utterance are considered, the state has proved its allegedly threatened interest is more important than the occasion for speech, and that threat to the state interest is immediate:

> 'In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger.' Learned Hand quoted in *Dennis* v. *U. S.,* 341 U. S. 494, 510 (1951).

The determination of whether expression may be constitutionally suppressed is peculiarly a balancing problem requiring a factual inquiry. The court must consider: (1) The importance of the state interest allegedly threatened; e. g., prevention of sedition would be a high interest, *Dennis* v. *U. S.,* 341 U. S. 494 (1951); but suppression of criticism of public officials would a low interest. *Pickering* v. *Board of Education,* 20 L. Ed. 2d 811 (1968); *Wood* v. *Georgia,* 370 U. S. 375, (1962); *New York Times* v. *Sullivan,* 376 U. S. 255 (1964); ***Garrison* v. *Louisiana*** 379 U. S. 64 (1964).

(2) The value of the occasion for speech. In a school whose purpose is to stimulate thought and instill democratic principles, expression should be highly valued. *Burnside* v. *Byars, supra,* p. 10; *West Virginia Board of Education* v. *Barnette,* 319 U. S. 674 (1943); *Dickey* v. *Alabama Board of Education,* 273 F.Supp. 613 (M. D. Ala. 1967); *Hammond* v. *South Carolina State College,* 272 F. Supp. 947 (D. S. C. 1967); cf. *Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957) and *Keyishian* v. *Board of Regents* 385 U. S. 589, 603 (1967).

(3) The probability that the invasion of the state interest will be accomplished. The probability would be high if the utterances were made to an already agitated crowd. *Feiner* v. *New York,* 340 U. S. 315 (1951), but very low where the persons exposed to the speech were a small, uncohesive group, not oriented to action. *Yates* v. *U. S.,* 354 U. S. 298 (1957).

(4) The availability of more moderate controls than those the state is attempting to justify. Suppression and punishment would not be appropriate to protect state interests where communication to correct fallacy is available:

> 'If there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence.' Brandeis concurring in *Whitney* v. *California,* 274 U. S. 357, quoted by Justice Douglas dissenting in *Dennis* v. *U.S.* 341 U. S. 494, 586, (1951).

The corrective power of more speech is a realistic method of dealing with written criticism of school officials alleged to be detrimental. *Pickering* v. *Board of Education,* 20 L. Ed 2d 811 but unrealistic as a means of protecting

the peace when intentional incendiary harangues are being given to an excited crowd. *Feiner* v. *New York,* 340 U. S. 315 (1951).

An analysis of these factors in the instant case results in the conclusion that defendants did not sustain their burden to prove that plaintiffs' publication of "Grass High" resulted in one of rare instances where critical expression may be punished. The danger of disruption to the Joliet school system was remote, considering the literary orientation of the journal, its non-incendiary tone, its limited distribution, and its lack of adverse effect. The value of allowing the publication as an outlet for creativ expression and as a means peacefully communicating student discontent to administrators is superior to protecting professional school administrators from the criticism. School administrators have the ability and means to answer criticism, therefore suppression of plaintiffs' publication should have been the last action taken, not the first.

2. Defendants Cannot Avoid A Judicial Balancing Of Competing Interests By The Imposition Of Irrebuttable Presumptions.

Plaintiffs alleged in their Complaint that their publication caused no danger to the only interest which defendants could constitutionally assert: the prevention of disruption of classroom activities. *Burnside* v. *Byars, supra.,* p. 10. The trial court deemed these allegations true for purposes of defendants' motion:

> "At no time did said distribution create a disturban which did or could have caused any commotion o disruption of classes at Joliet Central." Plaintiff Complaint, paragraph 9 (App. 3).

However, the Trial Court erroneously concluded, without hearing evidence, that plaintiffs' "speech itself" constituted "a direct and substantial threat to the successful operation of the school." (App. 41):

> "It is apparent from the face of the Complaint here that the minor plaintiffs had engaged in speech on school grounds which amounted to an immediate advocacy of, incitement to, and disregard of, school administrative procedures." (App. 41).

This finding was not even made in the defendants' Resolution of February 23, 1968 (App. 24, 25) expelling the plaintiffs. The Trial Court's holding can only be explained, by a irrebuttable presumption that plaintiffs' journal, regardless of proof of actual effect, created a "clear and present danger" to disruption of classes at Joliet Central. The Supreme Court has expressly rejected *per se* rules which consider words constitutionally unprotected, without proof of actual and detrimental effects. ***Wood*** **v.** ***Georgia,*** 370 U. S. 375; and ***Pickering*** **v.** ***Board of Education,*** 20 L. Ed. 2d 811 (1968).

Wood **v.** ***Georgia*** involved the constitutionality of a contempt citation against a county sheriff whom the District Court had found guilty of using language in a press release which the District Court characterized as ridiculing and interfering with a grand jury investigation and intentionally being contemptuous of the court. The contempt citation was predicated upon a theory that "the mere publishing of the news release [and defendants making of certain public statement] constituted a contempt of court, and of itself was a 'clear and present danger' to the administration of justice." 370 U. S. 375, 382.

The Supreme Court reversed the contempt citation and rejected the *per se* rule. The Court recognized that protection of the judicial system was a paramount state interest which may be superior to the petitioner's right of speech and press. However, the Court could find no evidence that petitioner's conduct actually did present a "clear and present danger" to the functioning of the judicial system. A conclusion that the words used would have the automatic effect ascribed to them by the state officials was insufficient; the effect must be proven:

> "Thus we have simply been told, as a matter of law without factual support [that] a clear and present danger will be created." 370 U. S. 375, 388.

In *Pickering* v. *Board of Education,* 20 L. Ed. 2d 811, (1968) petitioner, a school teacher, was dismissed from his employment as a Lockport, Illinois, high school because of a certain letter which he had published in a local newspaper critical of school policies. The defendant school board charged that the "publication of the letter damaged the professional reputations of the Board, and the superintendent and would foment controversy and conflict among the Board, teachers, administrators and residents of the district." 20 L. Ed. 2d 811, 816. In reversing and remanding, the Supreme Court noted that there was no evidence introduced in the state courts to show that the letter actually had any detrimental effect on the operation of the schools, but rather:

> "The Board must, therefore, have decided perhaps by analogy with the law of libel, that the statements were *per se* harmful to the operation of the schools." 20 L. Ed. 2d 811, 819.

The Court held that absent a showing of detrimental effect upon a paramount state interest, Pickering could not be dismissed for the mere use of words:

"[Pickering made statements] which are critical of his ultimate employer but which are *neither shown nor can be presumed* to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of schools generally." 20 L. Ed. 819. (emphasis supplied)

III. PLAINTIFFS CANNOT BE EXPELLED FOR CRITICIZING PUBLIC SCHOOL OFFICIALS.

1. Criticism of Public Officials Cannot Be A Valid Basis For Expulsion.

Defendants assert that prevention of disrespect and "contempt" justifies plaintiffs' expulsion regardless of the lack of any disruptive effect of the journal on classroom activity.[5] The terms "disrespect" and "contempt" are inherent in every criticism, for every criticism challenges authority. But it is just this "right to differ as to things that touch the heart of the existing order" that is the essence of the First Amendment freedom." *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 642 (1943).

Expression may be constitutionally inhibited only where it is subordinate to other individual's societal rights. However, the suppression of criticism of public officials, as in the instant case, does not promote a societal good; rather, its purpose is to insulate the defendants from critical comment. The Supreme Court has consistently refused to shield public officials from criticism, and stated that it is a fallacy to assume that respect is promoted by suppression of criticism. *Bridges* v. *California,*

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[5] Defendant's Resolution of February 23, 1968 found that the distribution of GRASS HIGH constitutes a "disregard of and contempt for the authorities charged with the administration of said Central Campus and said School District . . .". (App. 25)

314 U. S. 252 (1941); *New York Times* v. *Sullivan,* 376 U. S. 255 (1964); *Wood* v. *Georgia,* 370 U. S. 375 (1962); *Garrison* v. *Louisiana,* 379 U. S. 64 (1964); *Pickering* v. *Board of Education,* 20 L. Ed. 2d 811 (1968).

A recent case involving student publications, rejected "insubordination" as a legitimate state interest justifying expulsion. In *Dickey* v. *Alabama State Board of Education,* 273 F. Supp. 613 (M. D. Ala., 1967) the plaintiff was editor of the college newspaper. Plaintiff had sought and was denied permission to publish an editorial which was critical of the state government. Although forbidden to publish on the subject in controversy, plaintiff published in the school newspaper a caption and the word "censored" in the space where the editorial should have been. Because plaintiff had acted contrary to the advice of his faculty adviser and the president of the school, he was found to have committed 'willful and deliberate insubordination' and was suspended. 273 F. Supp. 613, 617. The District Court declared the action of explusion void, and ordered plaintiff's reinstatement with costs to the plaintiff.

The *Dickey* Court relied upon *Burnside* v. *Byars, supra,* p. 10, and held that plaintiff could not constitutionally be expelled for exercising "his constitutionally guaranteed right of academic and/or political expression." 273 F. Supp. 613, 618 and such expulsion could not be justified by the characterization of 'insubordination.' As in the instant case, defendants argued that readmission of plaintiff would jeopardize discipline in the schools. This proposition was summarily rejected by the *Dickey* Court because of its failure to consider the societal damage of such a rule.

> "Defendants' argument that [plaintiff's] readmission will jeopardize the discipline in the institution is

superficial and completely ignores the greater damage to college students that will result from the imposition of intellectual restraints such as . . . in this case." 273 F. Supp. 619.

Public officials, including high school administrators, whose positions make criticism an occupational hazard, are presumed to be "hardy men" able to perform their difficult tasks even when criticized by two seventeen year old high school students. *Craig* v. *Harney*, 331 U. S. 367 (1947). Also see *New York Times* v. *Sullivan*, 376 U. S. 255 (1964). Plaintiffs' meager journal, considering its content and distribution among sixty out of thousands of students, did not result in any great loss of respect for defendants, let alone disrupt classes.

In a series of U. S. Supreme Court cases involving contempt citations for attacks upon the judicial system, the judiciary asserted that the language used tended to diminish the respect which the public would have for the bench and thus to prejudice the administration of justice. However, even with such a vital interest as the administration of justice threatened, the Courts have uniformly upheld the criticism as protected by the First and Fourteenth Amendments. *Bridges* v. *California*, 314 U. S. 252 (1941); *Craig* v. *Harney*, 331 U. S. 367 (1947); and *Wood* v. *Georgia*, 370 U. S. (1962).

> [A]n enforced silence, however, limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect. Justice Black in *Bridges* v. *California*, 314 U. S. 352, 271.

2. Freedom To Criticize Is An Important Value In The High School.

The value of maximum freedom of expression in the schools must be balanced against the relative lack of seriousness of the dangers as alleged in defendants' Resolution of February 23, 1968. (App. 24, 25). Nowhere is the "value of the occasion" for speech more important than in the schools. Schools are training our young people for citizenship and to be able to compete in a constantly changing world. Therefore, exposure to a multitude of ideas should be tolerated as in any other segment of society. Suppression of the minds of young and punishment for disagreement does disservice not only to the development of the student as an individual, but to democratic society, which thrives on the expression of contrary views:

> "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of the multitude of tongues [rather] than through any kind of authoritative selection." *Keyishian* v. *Board of Regents*, 385 U. S. 589, 603 (1967) citing *U. S.* v. *Associated Press*, 42 F. 2d 362, 372.

Shortly after leaving high school, most of our young men are being asked to fight and to die to preserve the principles of our free society. These principles should not become meaningless words upon the pages of a civics text:

> "That [boards of education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach

youth to discount important principles of our Government as mere platitudes." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 637.

While educators are to be given wide latitude in educating the young, censorship of expression, because of disagreement or personal distaste, solely in the name of "education" offers little to commend itself when compared to the educational value of free exchange of ideas:

> "While we recognize the interest of society in protecting children, we find even the child's freedom of speech too precious to be subjected to the whim of the censor." *Interstate Circuit, Inc.* v. *Dallas* 366 F. 2d 590, 598, 599. (5th Cir. 1966) vacated and remanded on other grounds 391 U.S. 53 (1968).

Allowing maximum expression of student disagreement, in peaceful written form, will greatly aid school administrators in dealing with present student unrest. Such student publications will allow administrators insight into the student thinking, will anticipate student problems before they expand, and will increase rapport between students and administrators. School administrators, do not exercise their functions in "baronial castles." *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624. If peaceful channels of protest are not made available to students, more violent ones will most likely be found. This is the lesson of history and the pragmatic reason for the Constitutional guarantees of our liberties:

> "[Those who won our independence] knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government, that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones." *Whitney* v. *California*, 274 U. S. 357 (1927). (Brandeis, concurring).

The primary purpose of plaintiffs' journal was to provide an outlet for creative and constructive expression. This was not a single purpose tract devoted to advocacy of any particular disruptive action, nor an incendiary speech advocating unlawful activity, nor had either of the plaintiffs even presented any discipline problems. Rather, a minor part of the publication at issue contained criticism of the school administration by concerned students. Plaintiffs' publication was certainly a more reasonable form for criticism than the more violent and disruptive methods which appear to be sweeping high school and college campuses as a direct result of suppression by school officials of more peaceful forms of protest.

When balancing the need for free press against other state interests, the size, cohesiveness and orientation towards action of the group towards whom the publication is directed are important factors in determining how immediate is the "clear and present" danger to the paramount state interest. *Yates* v. *U. S.*, 354 U. S. 298 (1957). Plaintiffs' journal was distributed to sixty out of several thousand students. The distribution was not made in any meeting where disruptive ideas were being advocated nor did the distributees have any predisposition towards disruption.

Unlike any other segment of society, high school administrators have unique power to correct fallacies and influence behavior which may result from student criticism. Because administrators control resources of communication vastly superior to those open to students, school administrators can allow more dissent and criticism without fear of adverse consequences.

The Trial Court relied on *Adderley* v. *Florida*, 385 U. S. 39 (1966), which upheld the right of the state to limit demonstrations on jail property. However, unlike a jail, the maximum of expression should be tolerated in a school. The "special purpose" of a school is to educate the young for citizenship, to teach them the meaning of our open society, and to teach them to think and to apply creative effort to solve the difficult social problems of the times. In addition, *Adderley* is not applicable here because plaintiffs were expelled for the content of their speech, not where it was said. In *Adderley*, the petitioners were punished not for what they said, but where it was said:

> "There is not a shred of evidence in this record that this power was exercised, . . . because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses." 385 U. S. 39, 47.

In *Brown* v. *Louisiana*, 383 U. S. 131 (1966) the Court again stated that expression cannot be suppressed solely because of where it is said, unless the place has some relevance to an effect which the state may legitimately prevent. *Brown* v. *Louisiana* involved a sit-in in a public library. The State argued that special consideration should be given to the fact that the expression was exercised in a public library, "a place dedicated to quiet, to knowledge, and to beauty." 383 U. S. 131, 142. The Court in reversing the breach of the peace conviction stated that there was no evidence that the petitioner's conduct disturbed the library's users.

IV. THE ILLINOIS SCHOOL CODE WAS UNCONSTITUTIONAL AS APPLIED.

1. Where First Amendment Rights Are Infringed, The Courts Must Examine Sufficiency of Evidence.

The Trial Court based its judgment on the grounds that one sentence in plaintiffs' editorial "My Reply" constituted speech amounting to an "immediate advocacy of, and incitement to, disregard of school administrative procedures" and "legitimate administrative regulations." (App. 42). However, the trial court record does not indicate that there existed any such "administrative procedures" or "administrative regulations". Neither does the record indicate the existence of any disciplinary rule against the advocacy of change in school procedures or regulations. cf. *Dennis* v. *U. S.*, 341 U. S. 494 (1951). The record does not support the finding that plaintiffs' "pure speech" can be equated with "gross misconduct" or "gross disobedience" within the meaning of the Illinois School Code.

Where First Amendment rights are infringed, the Court must review the evidence to determine its sufficiency to justify violation of the imposed standard. The absence of evidence to support a finding which results in punishment may be raised on review and will justify reversal. *Thompson* v. *Louisville*, 362 U. S. 199 (1960), *Edwards* v. *South Carolina*, 372, U. S. 229 (1963), *Cox* v. *Louisiana*, 379, U. S. 536 (1965), *Brown* v. *Louisiana*, 383 U. S. 131 (1966).

The words of the Supreme Court in *Brown* v. *Louisiana* are equally applicable in the instant matter:

> "There was no disturbance of others, no disruption of library activities, and no violation of any library regulation." 383 U. S. 131, 142.

No finding of the defendants could bind this Court in its review to determine whether constitutional standards were violated. *Wood* v. *Georgia*, 370 U. S. 375, 386; as was stated in *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964):

> "But State courts may not preclude us from our responsibility to examine "the evidence to see whether it furnishes a rational basis for the characterization put on it. *In re Sawyer*, 360 U. S., 622, 628." 379 U. S. 375, 386.

2. The Illinois School Code Cannot Be Applied To Punish Peacefully Expressed Ideas.

The Illinois legislature in enacting the Illinois School Code, specifically required a finding of disruptive conduct to justify expulsion; nowhere does the School Code proscribe nor could it constitutionally limit the exercise of peacefully made written expression. Chapter 122 of the Ill. Rev. Stat. Sec. 10-22.6 provides:

> "[The School Board] has the power to (a) expel students guilty of gross disobedience or misconduct . . . "

Defendants have attempted to expand the meaning of the School Code to include the peaceful expression of criticism. The Resolution of February 23, 1968 provides as one of the grounds for plaintiffs' expulsion, that plaintiff were:

> "[Encouraging] the disregard and disobedience of orders promulgated by the duly constituted authority of said Central Campus, in said school district." (App. 25).

The Trial Court further expanded upon the School Code, by characterizing plaintiffs' publication as amounting "to an immediate advocacy of, incitement to, and disregard of school administrative procedures." (App. 42).

While legislative determination is ordinarily given weight in determining reasonableness, the plaintiffs' conduct had not been previously determined to be unlawful, and therefore, we are not dealing here with a regulation, 'encased in the armour wrought by prior legislative deliberation.' *Bridges* v. *California*, 314 U. S. 252, cited in *Wood* v. *Georgia*, 370 U. S. 375, 386.

Aside from lack of evidence to support such findings, plaintiffs could not be constitutionally punished for the peaceable expression of unpopular ideas. To the extent the School Code was applied to protected expression, it is unconstitutional. *Terminiello* v. *Chicago*, 337 U. S. 1 (1949); *Edwards* v. *South Carolina*, 372 U. S. 229 (1963); *Ashton* v. *Kentucky*, 384 U. S. 195 (1966); *Brown* v. *Louisiana*, 383 U. S. 131 (1966):

> "[A] generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent it fails to give adequate warning of the boundary line between the constitutionally permissable and the constitutionally unpermissable application of the statute." *Wright* v. *Georgia*, 373 U. S. 284, 292.

In *Cox* v. *Louisiana*, 379 U. S. 536 (1965), petitioners were involved in a civil rights march to the courthouse which terminated in loud cheering, clapping and the petitioners' urging of sit-ins at lunch counters. The city officials feared violence because the activity was centered in a predominantly white business district in Baton Rouge. Petitioner was charged with a "breach of the peace" which included as an element: "congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace might be occasioned." The Louisiana courts had further defined "breach of the peace" to mean 'to agitate, to arouse from a state of repose, to molest, to interupt, to hinder, to disquiet.' 379 U. S. 536, 551.

Petitioner's conviction was reversed on the grounds *inter alia* that the statute as interpreted would allow conviction for "peacefully expressing unpopular views." 379 U. S. 536, 551:

> "[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise. *Watson* v. *Memphis*, 337 U. S. 526, 535." 379 U. S. 536, 551.

In *Ashton* v. *Kentucky*, 384 U. S. 195, (1966), petitioner was convicted for distributing on a limited basis a pamphlet which was critical of certain local townspeople and officials in connection with a labor dispute. The Trial Court found that petitioner's conduct constituted the common-law crime of criminal libel; this was defined to include 'any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable.' 384 U. S. 195, 198. The Supreme Court reversed on the ground that the definition of the crime allowed punishment for the peaceful expression of ideas.

Ashton v. *Kentucky* relied upon *Terminiello* v. *Chicago*, 337 U. S. 1. *Terminiello* struck down a Chicago breach-of-the peace ordinance which the lower courts deemed applicable to conduct 'if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.' The Court characterized the essence of the constitutional infirmity as the allowing of standards of punishable conduct to depend upon "calculations as to the boiling point of a particular person or a particular group, not an appraisal of the nature of the comments

per se." The Court held that such a "wide open" standard allows a person to be punished for exercising protected expression because 'his neighbors have no self-control.' Quoting Chafee, *Free Press in the United States*, 151 (1954), 384, U. S. 195, 200."

3. Failure To Give Adequate Notice Of Prohibited Conduct Is A Fatal Flaw When Expression Is Attempted To Be Suppressed.

The only authority which defendants cite to justify plaintiffs' expulsion is the Illinois School Code, Ill. Rev. Stat. Ch. 122, Sec. 10.22.6. At the time of plaintiffs' expulsion, there was no student behavioral code nor any announced rule which even remotely warned plaintiffs that anything contained in their journal was punishable by expulsion. As an after-the-fact rationale, defendants have attempted to unconstitutionally characterize the publishing of plaintiffs' journal as "gross misconduct" or "gross disobedience" within the meaning of the Illinois School Code.

Regardless of the nature of the penalties, all governmental prohibitions involving sanctions which give no adequate guidelines are unconstitutionally vague. ***Jorden* v. *DeGeorge*,** 341 U. S. 223 (1951).

> "It is not the . . . penalty itself that [is] invalid, but the exaction of obedience to a rule or standard [that is] so vague and indefinite to be no rule or standard at all." *A. B. Small* v. ***American Sugar Refinery Co.***, 267 U. S. 233 (1925).

The allegation of the Resolution of February 23, 1968 are erroneous to the extent that they refer to promulgated "orders" which plaintiffs allegedly encouraged to be disregarded. There were no such orders. Defendants may not regulate legitimate state interests by vague prohibitions concerning which ordinary persons must speculate what is prohibited and what is forbidden. *Speiser* v. *Randall*, 357 U. S. 531 (1958).

> "All are entitled to be informed as to what the State commands or forbids." ***Lanzetta*** v. ***New Jersey***, 306 U. S. 453 (1939).

In *Wright* v. *Georgia*, 373 U.S. 284 (1962), petitioners were charged and convicted of assembling for the purpose of 'disturbing the public peace . . . and not dispersing at the command of the officers.' 373 U.S. 284, 287. In attempting to justify the breach of the peace conviction, the State argued that the petitioners had violated a rule which reserved the playground for younger people at the time the petitioners were admittedly using the park. The evidence established that the police officers did not warn petitioners of this rule nor were there any printed regulations giving notice of the rule. The Court held that the statute as applied was unconstitutionally vague:

> "Under any view of the facts alleged to constitute the violation it cannot be maintained that petitioners had adequate notice that their conduct was prohibited by the breach of the peace statute. It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process [citing cases]." 373 U.S. 284, 293.

Vague prohibitions, which are applied to proscribe speech or press, necessarily have a "chilling effect" on protected expression; in attempting to avoid punishment imposed by vague standards, citizens will limit their expression more than is constitutionally required. Vague standards have an inhibitory effect on all conduct, but a generally worded statute may be tolerated if applicable solely to conduct outside the protection of the first amendment. Vagueness will not be tolerated to the extent guessing as to the meaning and application may have in inhibitory effect on expression. ***Cramp*** v. ***Board of Public Instruction***, 368 U.S. 278 (1961); ***Smith*** v. ***California***, 361 U.S. 147, 151 (1959); *Ashton* v. ***Kentucky***, 384 U.S. 195 (1966); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); ***Cox*** v. ***Louisiana***, 379 U.S. 536 (1965):

> Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or the power of the press suffer. *Ashton* v. *Kentucky*, 384 U.S. 195, 200.

In *Edwards* v. *South Carolina*, 372 U.S. 229, the State attempted to use a broad "breach-of-the-peace" statute to justify suppression of a parade.[6] Mr. Justice Stewart held for the majority that these broad statutes could not be constitutionally applied to prohibit speech; the evil was the application of the statute to suppress speech without prior and sufficient warning:

> "We do not review in this case criminal convictions resulting from the even-handed application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioner had been convicted upon evidence that they

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[6] The language of that breach-of-the-peace statute was even more precise than the Illinois School Code: "A violation of public order, a disturbance of public tranquility by any act or conduct exciting to violence . . . any violation of any law enacted to preserve peace and good order." 372 U.S. 229, 234.

had violated a law regulating traffic, or had disobeyed a law reasonably limited the period during which the State House grounds were open to the public, this would be a different case . . ." *Edwards v. South Carolina*, 342 U.S. 229, 236.

4. The Court Must Consider Whether The State Could Have Accomplished Its Objectives Through More Precise Standards.

.The Court must consider whether the legitimate state interest could have been protected by a more carefully and narrowly drawn statute which would have given more notice of the prohibited activity. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

In the instant case, defendants were satisfied with the broad power inherent in the vague and undefined Illinois School Code and did not even attempt to draw regulations which advised the students of proscribed conduct. It is instructive to note the comparative precision with which the *Model Penal Code* deals with the subject of disorderly conduct. Disorderly conduct concerns regulatory problems similar to that with which the Illinois School Code attempts to regulate:

> "250.2. Disorderly Conduct.
>
> (1) Offense defined. A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
>
> (a) engages in fighting or threatening, or in violent or tumultuous behavior; or
>
> (b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or

> (c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.
>
> "Public" means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood."

* * * *

Model Penal Code, ALI, Proposed Off. Draft. Sec. 250.2.

CONCLUSION

For the reasons stated, the judgment of the District Court, should be reversed, with instructions to grant relief requested by plaintiffs in their Motion for Interlocutory Relief, and in their Complaint.

Respectfully submitted,

Paul M. Lurie
208 South LaSalle Street
Chicago, Illinois 60604
Attorney for Plaintiffs-Appellants.

Of counsel:
Fohrman and Lurie
208 South LaSalle Street
Chicago, Illinois 60604
332-4611

(Supplement to Scoville Brief)

ARGUMENT

The Trial Court decided this case on pleadings which affirmatively alleged a lack of "commotion or disruption" in connection with plaintiffs' publishing of the journal in question (Complaint, paragraph 10, App. 3). Further, defendants' Resolution of Expulsion attached to plaintiffs' Complaint lacked a finding of "gross misconduct, gross disobedience" or any disruption (App. 24, 25 and 26). To fill this evidentiary void, defendants attempt to create a series of irrebuttable presumptions: plaintiffs' opinions are presumed to be disruptive; and plaintiffs' use of printed words is presumed to be "deliberate" and "disruptive."

In cases involving First Amendment issues, irrebuttable presumptions and subjective apprehensions of distrubance cannot be substituted for evidence. (See Appellants' Brief, page 15 et seq.) Plaintiffs' position is further supported by the case of Tinker v. Des Moines Independent Community School District, 21 L. Ed. 731 (1969), decided after submission of Appellants' Brief. That case held that high school students can only be expelled for the exercise of expression when the record upon which such expulsion is based contains facts upon which school administrators could justify a finding that unless the expression was suppressed, classroom activity would be materially disrupted or substantial disorder would be created. The Tinker trial court, which was affirmed without opinion by the 8th Circuit, had held that courts should give administrators broad discretion and that discipline for expression would be tolerated so long as any disturbance could be reasonably anticipated. The Tinker trial court expressly rejected the standards of Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966) which limited administrators' power of discipline not to "any disturbance" but only to those situations where the expression 'materially and substantially interfered with the requirements of appropriate discipline in the operation of the school.' 258 F. Supp. 971, 973. Under the Burnside view, the school's anticipation of any disturbance was insufficient to justify discipline.

The Supreme Court in Tinker adopted the Burnside view and held that the mere subjective apprehension of disturbance by the school administrators was insufficient to justify expulsion for the exercise of First Amendment rights. The school officials must establish that unless suppressed, the expression will result in material disruption of class work, substantial disorder, or the invasion of the rights of others. 21 L. Ed. 731, 741.

Defendants argue that plaintiffs deliberately proposed violation of "school procedures." There is no evidence in the record of such "deliberateness" nor of such "procedures;" and if there were a question of intention, it would not be appropriately decided on the motion filed by defendants of the Trial Court (App. 31-32). Even assuming plaintiffs' intentions were deliberate, there is no evidence of the required finding of disruptive effect unless the court engages in another irrebuttable presumption. Defendants' argument appears to be based on a premise that the audacity of plaintiffs' statements evidences insubordination and it is this insubordination which justifies findings of "misconduct" and "material disturbance." However, the Supreme Court in Tinker considered deliberateness irrelevant to the issue of disruption. The Court found that the expressions in Tinker were protected even though they were a deliberate violation of a previously announced school regulation: "Petitioners were aware of the regulation that the school authorities adopted banning the arm bands." 21 L. Ed. 731, 736. Also see the discussion in Appellants' Brief on insubordination at page 19.

Defendants' arguments appear to have as an undertone the premise that plaintiffs' "crime" was the challenging of authority and that in the name of training for obedience students can be punished for peaceful exercise of criticism. This view of the necessity of the students' blind obedience to authority has been recently rejected in Breen v. Kahl, U.S.D.C.,

W. Wisc., decided February 20, 1969, reported in 37 LAW WEEK 2506, a case decided after the submission of Appellants' Brief. That case held invalid a regulation forbidding long male hair and ordered a notation of disciplinary action to be expunged from plaintiffs' records. Judge Doyle stated in that case:

> "So far as education of young people in obedience is concerned, it is important for them to appreciate the present vitality of our proud tradition that although we respect government in the exercise of its constitutional powers, we jealously guard our freedoms from its attempts to exercise unconstitutional powers." 37 LW 2057.

Unlike most disciplinary cases which have reached the courts, no regulation was in effect at the time of plaintiffs' expulsion forbidding the conduct for which plaintiffs were ultimately expelled; nor were plaintiffs ever warned that their activity would be cause for expulsion. Defendants contend at page 20 of Appellees' Brief that plaintiffs should have known that they were violating "accepted rules of conduct" and were urging students to violate "accepted procedures";* and they should have known that this activity would have resulted in expulsion.

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* Defendants urge as another irrebuttable presumption that a tongue-in-cheek urging of the destruction of "propaganda," should be expanded in meaning to include all papers, articles, reports, information sheets and Principal's Reports to Parents. Appellees' Brief, page 13.

In the
United States Court of Appeals
For the Seventh Circuit

No. 17190 SEPTEMBER TERM, 1969 SEPTEMBER SESSION, 1969

RAYMOND SCOVILLE, a minor, and MERRILL SCOVILLE, as father and next friend; ARTHUR BREEN, a minor, and JERRY BREEN, as father and next friend,
Plaintiffs-Appellants,
v.
BOARD OF EDUCATION OF JOLIET TOWNSHIP HIGH SCHOOL DISTRICT 204, COUNTY OF WILL, STATE OF ILLINOIS; ARTHUR L. BRUNING, DAVID R. ROSS, HOWARD JOHNSON and CLAYTON WINTERSTEEN,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 1, 1970

Before SWYGERT, *Chief Judge,* CASTLE, *Senior Circuit Judge,* KILEY, FAIRCHILD, CUMMINGS and KERNER, *Circuit Judges, en banc.*

KILEY, *Circuit Judge.* The plaintiffs, minors, were expelled from high school after writing, off the school premises, a publication which was distributed in school and which contained, among other things, material critical of school policies and authorities. This civil rights action was brought for declaratory judgment, injunctive relief, and damages,[1] alleging violation of First and Fourteenth Amendment rights, as well as an unconstitutional application of an Illinois statute. The district court dismissed the suit for failure to state a claim upon which relief could be granted. A panel of this court, in an opinion (one judge dissenting) issued September 25, 1969, affirmed the district court's judgment dismissing the complaint. Subsequently, this court granted plaintiffs' petition for rehearing *en banc*. We now reverse the district court's judgment and remand for further proceedings.

The plaintiffs are Raymond Scoville and Arthur Breen, students at Joliet Central High School, one of three high schools administered by the defendant Board of Education. Scoville was editor and publisher, and Breen senior editor, of the publication "Grass High." They wrote the pertinent material. "Grass High" is a publication of fourteen pages containing poetry, essays, movie and record reviews, and a critical editorial. Sixty copies were distributed to faculty and students at a price of fifteen cents per copy.

On January 18, 1968, three days after "Grass High" was sold in the school, the dean advised plaintiffs that they could not take their fall semester examinations. Four days thereafter plaintiffs were suspended for a period of five days. Nine days after that Scoville was removed as editor of the school paper, and both he and Breen were deprived of further participation in school debating activities.

The dean then sent a report to the superintendent of the high schools with a recommendation of expulsion for the remainder of the school year. The superintendent wrote the parents of plaintiffs that he would present the report, together with the recommendation, to the Board of Education at its next meeting. He invited the parents to be present. Scoville's mother wrote a letter to the Board (plaintiffs' Exhibit 2, appended to the complaint) expressing plaintiffs' sorrow for the trouble they ~~students~~ had caused, stating that they had learned a lesson, that they were worried and upset about possible interruption in their education and that the parents thought the boys had already been adequately punished. Neither plaintiffs nor their parents attended the Board meeting. The Board expelled plaintiffs from the day classes for the second semester, by virtue of the Board's authority under ILL. REV. STAT. Ch. 122, Sec. 10-22.6 (1967), upon a determination that they were guilty of "gross disobedience [and] misconduct." The Board permitted them to attend, on a probationary basis, a day class in physics, and night school at Joliet Central. The suit before us followed.

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[1] The period of expulsion has ended and plaintiffs were readmitted to Joliet Central High School as seniors for the school year 1969-70. This fact renders moot the question of injunctive relief against the Board of Education's order. Remaining are the questions of declaratory judgment, injunctive relief with respect to restraining defendants from sending information of the expulsion to colleges and prospective employers of plaintiffs, and with respect to expunging the expulsions from the school record.

1968-1969

Upon defendants' motion to dismiss, the district court decided that the complaint, on its face, alleged facts which "amounted to an immediate advocacy of, and incitement to, disregard of school administrative procedures," especially because the publication was directed to an immature audience. In other words, the court implicitly applied the clear and present danger test, finding that the distribution constituted a direct and substantial threat to the effective operation of the high school. At no time, either before the Board of Education or in the district court, was the expulsion of the plaintiffs justified on grounds other than the objectionable content of the publication. The Board has not objected to the place, time or manner of distribution. The court found and it is not disputed that plaintiffs' conduct did not cause any commotion or disruption of classes.

No charge was made that the publication was libelous, and the district court felt it unnecessary to consider whether the language in "Grass High" labeled as "inappropriate and indecent" by the Board could be suppressed as obscene.[2] The court thought that the interest in maintaining its school system outweighed the private interest of the plaintiffs in writing and publishing "Grass High." The basis of the court's decision was an editorial entitled "My Reply" (a copy of which is appended to this opinion) which—after criticizing the school's pamphlet, "Bits of Steel," addressed to parents—urged the students not to accept "in the future," for delivery to parents, any "propaganda" issued by the school, and to destroy it if accepted.

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[2] The Board found sufficient to justify expulsion that the action of plaintiffs

(1) constitutes a public use of inappropriate and indecent language, (2) constitutes a violation of established rules of said school district, (3) constitutes a disregard of and contempt for the

I

Plaintiffs contend that the expulsion order violated their First and Fourteenth Amendment freedoms. The same cases are cited by plaintiffs and defendants in support of their arguments on this contention. The authoritative decision, pertinent to the important[3] issue before us, is *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).[4] *Tinker* is a high school "arm band" case, but its rule is admittedly dispositive of the case before us.[5]

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[2] (Cont.)

> authorities charged with the administration of said Central Campus and said school district, (4) encourag[illegible] the disregard and disobedience of orders promulgated by the duly constituted authorities of said Central Campus and said school district, (5) involves other students as parties to the preparation and distribution of the aforesaid writing who were in fact not parties thereto.

Board resolution, plaintiffs' Exhibit 3, appended to the complaint.

There is a risk with respect to (4) above. "But our Constitution says we must take this risk." *Tinker v. Des Moines School District*, 393 U.S. 503, 508 (1969).

The Board relied upon an unwritten policy which was presumably applied ex post facto to the plaintiffs.

[3] "High school underground newspapers are spreading like wildfire in the Chicago area." *High School Students Are Rushing into Print—and Court*, Nation's Schools, Jan. 1969, p. 30. See also Nahmod, *Black Arm Bands and Underground Newspapers: Freedom of Speech in the Public Schools*, 51 Chicago Bar Record 144 (Dec. 1969).

[4] The Supreme Court decision in *Tinker* was not filed until after the district court decided the case before us and after plaintiffs' original brief was filed. *Tinker* was cited and discussed in defendants' brief and in plaintiffs' reply brief.

[5] The closest case factually which gives support to plaintiffs is the university publication case of *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967)—also decided before *Tinker*. The fact that it involved a university is of no importance, since the relevant principles and rules apply generally to both high schools and universities.

We think the district court should not have been too concerned over the immaturity of the student readers of "Grass High." Professor Charles Alan Wright has noted, however: "It is likely that the tolerable limit for student expression in high school should be narrower than at college or university level." Wright, *The Constitution Has Come to the Campus*, 22 VAND. L. REV. 1052, 1053 (1969).

The *Tinker* rule narrows the question before us to whether the writing of "Grass High" and its sale in school to sixty students and faculty members could "reasonably have led [the Board] to *forecast* substantial disruption of or material interference with school activities . . . or intru[sion] into the lives of others."[*] *Tinker* v. *Des Moines School District*, 393 U.S. at 514. (Emphasis added.) We hold that the district court erred in deciding that the complaint "on its face" disclosed a clear and present danger justifying defendants' "forecast" of the harmful consequences referred to in the *Tinker* rule.

Tinker announces the principles which underlie our holding: High school students are persons entitled to First and Fourteenth Amendment protections. States and school officials have "comprehensive authority" to prescribe and control conduct in the schools through reasonable rules consistent with fundamental constitutional safeguards. Where rules infringe upon freedom of expression, the school officials have the burden of showing justification. See also *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966); *Blackwell v. Issaquena Co. Board of Education*, 363 F.2d 749 (5th Cir. 1966); *Soglin v. Kaufman*, No. 17427 (7th Cir. Oct. 24, 1969); *Breen v. Kahl*, Nos. 17552, 17553 (7th Cir. Dec. 3, 1969); *Dickey v. Alabama State Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967); *Jones v. State Board of Education*, 279 F. Supp. 190 (M.D. Tenn. 1968). There is no dispute here about the applicable principles or decisional rules.

Plaintiffs' freedom of expression was infringed by the Board's action, and defendants had the burden of showing that the action was taken upon a reasonable forecast of a substantial disruption of school activity. No reasonable inference of such a showing can be drawn from the complaint which merely alleges the facts recited in the beginning of this opinion. The criticism of the defendants' disciplinary policies and the mere publication of that criticism to sixty students and faculty members leaves no room for reasonable inference justifying the Board's action. While recognizing the need of effective discipline[7] in operating schools, the law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students imaginations, intellects and wills be unduly stifled or chilled. Schools are increasingly accepting student criticism as a worthwhile influence in school administration.[8]

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[*] This "forecast" rule is an extension of the "substantial disruption or material interference" rule applied in the leading decision of *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), in favor of students, and in *Blackwell v. Issaquena Co. Board of Education*, 363 F.2d 749 (5th Cir 1966), against students' conduct.

Absent an affirmative showing by the defendants, the district court, faced with the motion to dismiss, inferred from the admitted facts in plaintiffs' complaint and the presented exhibits that the Board action was justified. However, the district court had no factual basis for, and made no meaningful application of, the proper rule of balancing the private interests of plaintiffs' free expression against the state's interest in furthering the public school system. *Burnside v. Byars*, 363 F.2d at 748. No evidence was taken, for example, to show whether the classroom sales were approved by the teachers, as alleged; of the number of students in the school; of the ages of those to whom "Grass High" was sold; of what the impact was on those who bought "Grass High"; or of the range of modern reading material available to or required of the students in the school library. That plaintiffs may have intended their criticism to substantially disrupt or materially interfere with the enforcement of school policies is of no significance per se under the *Tinker* test.

The "Grass High" editorial imputing a "sick mind" to the dean reflects a disrespectful and tasteless attitude toward authority. Yet does that imputation to sixty students and faculty members, without more, justify a "forecast" of substantial disruption or material interference with the school policies or invade the rights of others? We think not. The reference undoubtedly offended and displeased the dean. But mere "expression of [the students'] feelings with which [school officials] do not wish to contend" (*Tinker v. Des Moines School District*, 393 U.S. at 511; *Burnside v. Byars*, 363 F.2d at 749) is not the showing required by the *Tinker* test to justify expulsion.

---

[7] Ill-considered suppression carries its own dangers. For example, in *Blackwell v. Issaquena Co. Board of Education*, 363 F.2d at 751, it is said that three students wore the challenged freedom buttons on Friday. They were taken to the principal who ordered the buttons removed. The three refused to do so and were suspended. On Monday 150 students wore the buttons.

[8] The Harvard Law Review states "[R]esponsible student criticism of university officials is socially valuable since in many instances the students are peculiarly expert in campus issues and possess a unique perspective on matters of school policy." *Developments in the Law-Academic Freedom*, 81 HARV. L. REV. 1045, 1130 (1968). Prudent criticism by seventeen-year-old high school juniors may also have value.

Finally, there is the "Grass High" random statement, "Oral sex may prevent tooth decay." This attempt to amuse comes as a shock to an older generation. But today's students in high school are not insulated from the shocking but legally accepted language used by demonstrators and protestors in streets and on campuses and by authors of best-selling modern literature. A hearing might even disclose that high school libraries contain literature which would lead students to believe the statement made in "Grass High" was unobjectionable.[9]

We believe the discussion above makes it clear, on the basis of the admitted facts and exhibits, that the Board could not have reasonably forecast that the publication and distribution of this paper to the students would substantially disrupt or materially interfere with school procedures.

II

The sole authority for the Board's action is Ill. Rev. Stat. Ch. 122, Sec. 10-22.6 (1967), which gives the School Board the power "to expel pupils guilty of gross disobedience or misconduct." In view of our conclusion that the complaint "on its face" discloses an unjustified invasion of plaintiffs' First and Fourteenth Amendment rights, it follows that we agree with plaintiffs that the Board applied the Illinois statute in an unconstitutional manner.

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[9] See Nahmod, *Black Arm Bands and Underground Newspapers: Freedom of Speech in the Public Schools*, 51 Chicago Bar Record, 144, 152 n.4 (Dec. 1969).

We conclude that absent an evidentiary showing, and an appropriate balancing of the evidence by the district court to determine whether the Board was justified in a "forecast" of the disruption and interference, as required under *Tinker*, plaintiffs are entitled to the declaratory judgment, injunctive and damage relief sought.

The cause is remanded for further proceedings.

REVERSED AND REMANDED.

APPENDIX

MY REPLY

Recently, we students at Joliet Central were subjected to a pamphlet called "Bits Of Steel." This occurrence took place a few weeks before the Christmas vacation. The reason why I have not expressed my opinions on this pamphlet before now is simple: being familiar with the J-HI Journal at Central, I knew that they would not print my views on the subject.

In my critique of this pamphlet I shall try to follow the same order in which the articles were presented.

The pamphlet started with a message from the principal, David Ross. This is logical because the entire pamphlet is supposed to be "The Principal's Report to Parents." In this article Ross states why the pamphlet was put out and the purpose it is supposed to accomplish, namely, the improvement of communication between parents and administration. He has to be kidding. Surely, he realizes that a great majority of these pamphlets are thrown away by the students, and in this case that is how it should have been. I urge all students in the future to either refuse to accept or destroy upon acceptance all propaganda that Central's administration publishes.

The second article told about the Human Relations committee which we have here at Central. It told why the committee was assembled and what its purpose is. It also listed the members of the committee who attend school here at Central. All-in-all this was probably the best article in the whole pamphlet, but never fear the administration defeated its own purpose in the next article which was a racial breakdown of the Central campus. As far as I could see this article served no practical purpose. By any chance did the administration feel that such a breakdown would improve racial relations? I think not. This article had such statements as: Spanish American students were included with the white students. Well, wasn't that nice of the administration. In other words, the only difference noted was whether the student was white or Negro.

This was followed by an article called "Did you Know?" This was, supposedly, to inform the parents of certain activities. Intertwined throughout it were numerous rules that the parents were to see their children obeyed. Quite ridiculous.

Next came an article on attendance. There's not much I can say about this one. It simply told the haggered parents the utterly idiotic and asinine procedure that they must go through to assure that their children will be excused for their absences.

Question from the parents was the next in the line of articles. This consisted of a set of three questions written by the administration and then answered by the administration. The first question was designed to inform the reader about the background of the new superintendent. The second was about the paperbacks which were placed in the dean's office. They state that the books were put there "so that your sons and daughters may read while they wait. The hope is that no moment for learning will be lost." Boy, this is a laugh. Our whole system of education with all its arbitrary rules and schedules seems dedicated to nothing but wasting time. The last question concerned the Wednesday Que-ins. It was followed by a quote: "Sometimes we, parents and schoolmen must seem cruel in order to be kind to the children placed in our care." Do you think that the administration is trying to tell us something about the true purpose of the Wednesday Que-ins?

The next gem we came across was from our beloved senior dean. Our senior dean seems to feel that the only duty of a dean or parent is to be the administrator of some type of punishment. A dean should help or try to understand a student instead of merely punishing him. Our senior dean makes several interesting statements such as, "Proper attitudes must be part of our lives and the lives of our children." I believe that a person should be allowed to mold his own attitudes toward life, as long as they are not radically anti-social, without extensive interference from persons on the outside, especially these who are unqualified in such fields. Another interesting statement that he makes is "Therefore let us not cheat our children, our precious gifts from God, by neglecting to discipline them!" It is my opinion that a statement such as this is the product of a sick mind. Our senior dean because of his position of authority over a large group of young adults poses a threat to our community. Should a mind whose only thought revolves around an act of discipline be allowed to exert influence over the young minds of our community? I think not. I would urge the Board of Education to request that this dean amend his thinking or resign. The man in the dean's position must be qualified to the extent that his concern is to help the students rather than discipline or punish them.

This pamphlet also contained an article from the freshman dean. I should like to say that Dean Engers, in his article, shows a great deal of promise. He appears to be genuinely interested in the problems of the students entrusted to him. All I can say to him is to keep up the good work.

The last thing of any interest in the pamphlet was about the despicable and disgusting detention policy at Central. I think most students feel the same way as I about this policy. Therefore I will not even go into it.

In the whole pamphlet I could see only one really bright side. We were not subjected to an article written by Mr. Diekelman.

Senior Editor
Grass High

No. 17190

CASTLE, *Senior Circuit Judge*, dissenting. I find myself constrained to disagree with the majority's conclusion that *Tinker* v. *Des Moines School District*, 393 U.S. 503, and the other cases relied upon, dictate that in the circumstances of this particular case an evidentiary hearing was a prerequisite to the District Court's implicit finding and conclusion that the disciplinary action taken by the school board was justified. Here, there was admitted action by the minor plaintiffs, through the medium of their publication "Grass High", calling upon their fellow-students to flaunt the school's administrative procedure by destroying, rather than delivering to their parents, materials delivered to the students for the latter purpose.

I perceive no occasion here for the court to hear evidence bearing on the actual or likely success or effect of such advocacy as a prerequisite to a "balancing of the private interests" of these adolescent plaintiffs' "free expression" against the state's interest in conducting an efficient system of public schools. In my view, plaintiffs' advocacy of disregard of the school's procedure carried with it an inherent threat to the effective operation of a method the school authorities had a right to utilize for the purpose of communicating with the **parents** of students.

I would affirm the judgment of the District Court.

A true Copy:
Teste:

....
Clerk of the United States Court of
Appeals for the Seventh Circuit.

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Joliet High School Asks for Review of Scoville Case

BY PAMELA ZEKMAN

Opposing parties in a two-year-old controversy involving the rights of high school students agree on only one thing—there is a need for clear rules telling high school officials how far their authority to operate schools can extend without infringing on students' constitutional rights.

For that reason the Joliet Township High school board has voted to authorize Atty. Richard Buck to petition the United States Supreme court to review the recent 5-to-1 federal Court of Appeals decision against them.

The decision held that school officials should not have expelled two students, Raymond Scoville and Arthur Breen, in 1968 for distributing a literary magazine, "Grass High," at Joliet Central High school if they could not "reasonably forecast" that a substantial disruption of school procedures would result.

Have Since Graduated

Both students were expelled for one semester, readmitted after they initiated court action, and have since graduated. Scoville, 925 Oakland av., Joliet, dropped out of the University of Chicago after his first quarter there because he "didn't like school in general." He is looking for a job in Joliet but is "having difficulty because I have long hair I guess."

Breen, 655 Ross st., Joliet, is working for an aluminum processing company.

The magazine the two published contained poetry, essays, and an editorial critical of school personnel that urged students to either refuse to accept or destroy upon acceptance all "propaganda" published by the school administration. Since their graduation, the two youths have periodically published other editions. The last one was seen at the school in February.

The appeals court relied on a United States Supreme Court decision handed down Feb. 24, 1969, [Tinker v. Des Moines Independent Community School district] in which the court upheld the right of high school students to wear black armbands on school facilities.

Apply "Tinker Rule"

In the Scoville case, the court of appeals applied the "Tinker rule" which they said narrows the issue to whether distribution of "Grass High" could reasonably have led school officials to "forecast a substantial disruption of, or material interference with school activities . . . or intrusion into the lives of others."

"I would challenge anyone to define what is a real and present danger of disruption," Dr. Arthur Bruning, Joliet school superintendent, said. "If someone distributes literature that could precipitate a violent confrontation with students, should the school wait until the confrontation occurs before they take action?

"We feel the decision goes far beyond the expulsion of these two students and far beyond Joliet school," Bruning said. "Therefore we feel it [the case] should be carried to its conclusion so that the conduct of all school officials can be clarified. This poses a threat to the conduct of schools and there is a great deal of concern."

Mail Opposes Ruling

The superintendent reported the school has received heavy mail opposing the court ruling and several offers from various organizations and other school districts to join in the petition to the Supreme court. He said they plan to solicit assistance in their endeavor.

Paul Lurie, attorney for the American Civil Liberties Union [A. C. L. U.], who represented the students in the suit, said, "We're tickled pink that the district has voted to appeal the decision. We can't lose. I would be shocked if the Supreme court disagreed with this decision."

Jay Miller, head of the Illinois chapter of the A. C. L. U., said he felt the Scoville decision was "clear, well reasoned, and well laid out. It is almost inconceivable that the United States Supreme court won't agree with it."

While Dr. Bruning looks to the Supreme court to clarify the position of school officials, Miller feels the courts have done their job and that it is now time for boards of education to advise their principals on current and probable future court decisions.

The A. C. L. U. has encouraged school administrators to embark on such a program. They feel such action is needed to inform school officials and to give to students, who might otherwise risk expulsion, clear notice of what can and cannot be done in the area of protest activities at schools.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

EDWARD RISEMAN, a minor, by his brother and next friend, RONALD RISEMAN, individually and on behalf of all similarly situated students in the School District of Quincy

Plaintiffs-Appellants

vs.

THE SCHOOL COMMITTEE OF THE CITY OF QUINCY, et al.

Defendants-Appellees

PLAINTIFFS' BRIEF ON
APPEAL FROM THE DISTRICT OF MASSACHUSETTS

Carolyn Peck

Center for Law and Education
Harvard University
38 Kirkland Street
Cambridge, Massachusetts 02138

Michael Altman

Boston Legal Assistance Project
474 Blue Hill Avenue
Dorchester, Massachusetts 02121

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STATEMENT OF ISSUES

1. Whether the Circuit Court of Appeals has jurisdiction over an appeal from a district court order which granted a temporary restraining order but denied plaintiffs motion for a temporary injunction.

2. Whether school officials of a public school may prevent students from distributing leaflets and other forms of written expression within school buildings even if distribution is carried out in an orderly and not substantially disruptive manner.

3. Whether Rule 4:17 of the Quincy Public Schools is vague and overbroad and violates plaintiffs' rights under the First and Fourteenth Amendments.

4. Whether school officials of a public school can require students to submit to them written forms of expression for approval prior to distribution within the schools.

STATEMENT OF THE CASE

This is an appeal from a decision of Judge Francis Ford and the "Temporary Restraining Order" entered upon plaintiff's motion for a temporary injunction.

This action was commenced on July 24, 1970. Jurisdiction of the district court was invoked under Title 28 U.S.C., Sections 1343 and 2201. The cause of action is authorized by Title 42 U.S.C., Section 1983. The plaintiff's basic claim is that he is being denied his right to freedom of expression guaranteed by the First and Fourteenth Amendments to the United States Constitution by the defendants' refusal to allow him to distribute leaflets within the school.

On July 24, 1970, plaintiffs filed a motion to proceed in forma pauperis in the district court. On July 28, 1970, the district court denied the motion without giving any written reasons. On July 31 a second in forma pauperis motion was filed and denied on August 12, 1970, without reasons.

On August 25, 1970, a motion for a temporary injunction was filed in district court. Defendants were notified by mail on August 20 that the motion for a temporary injunction would be made. On September 17, 1970, an Order to Show Cause issued notifying defendants that a hearing on the motion for a temporary injunction would be held on September 22, 1970.

On September 22, 1970, Judge Francis Ford held a hearing on the motion for a temporary injunction. Counsel for both parties were present and argued the case. Plaintiffs presented Edward Riseman's affidavit which incorporated the complaint by reference. No other evidence was introduced by either plaintiff or defendant.

On the same day, Judge Francis Ford denied plaintiffs' motion for an injunction and granted a temporary restraining order which prohibited defendants from interfering with leafletting on school premises outside school buildings. The district court refused to restrain defendants from interfering with non-substantially disruptive leafletting within the school building in accordance with plaintiffs' request for relief.

On September 24 plaintiffs filed their Notice of Appeal and on September 25 plaintiffs filed a motion to appeal in forma pauperis in district court. On September 24 plaintiffs moved in the First Circuit Court for an injunction pending appeal. On September 29 plaintiffs filed a motion to proceed in forma pauperis in the circuit court. A hearing was held on both motions before the First Circuit Court on September 29 and the Court granted the motion to proceed in forma pauperis and the injunction pending appeal.

On April 14, 1970, plaintiff Edward Riseman attempted to distribute leaflets in a hallway of the Reay E. Sterling Junior High School in the City of Quincy where he was a student.[1] One leaflet announced an anti-war rally which was scheduled to be held on the Boston Common the next day after school hours. The second leaflet was entitled "A Student Bill of Rights" and contained descriptions of rights and privileges which the plaintiff believes should be afforded students in the public schools. The distribution did not result in any disruption of regular school activities. Edward Riseman was summoned from morning class to the office of the principal of the school, Arnold Rubin, who took the leaflets not yet distributed from plaintiff and told plaintiff that he could not distribute the leaflets in school, because he had not sought prior approval. On April 28 Edward Riseman spoke again with the principal about his desire and right to distribute leaflets in school. Mr. Rubin agreed that plaintiff had a constitutional right to distribute leaflets in school, but that that did not mean plaintiff had to exercise that right. Plaintiff was told he would have to obtain permission to leaflet from the Superintendent of Schools or the School Committee. That same day, Edward Riseman called Dr. Creedon, the Superintendent of Schools, and asked to appear before the School Committee. He was told his request must be in writing. On May 1, Edward Riseman put his request in writing to Dr. Creedon. He received a reply on May 11 which did not set a date for his School Committee appearance, but referred the matter to the Coordinator of Social Studies, Mr. Carl Deyeso. On May 13, Edward Riseman met with Mr. Deyeso and Mr. Rubin and Mr. Rubin said that further distribution of leaflets would be in defiance of the School Committee rule and would result in suspension.

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[1] The statement of facts set forth herein is taken from the affidavit of Edward E. Riseman and the complaint herein, incorporated into the affidavit which were the only evidence presented at the district court hearing on plaintiffs' motion for a temporary injunction. The affidavit and complaint are set forth in the Appendix, pp. 6A - 23A.

Shortly thereafter, Edward Riseman contacted James Bensfield, an attorney, who wrote on May 19 to the School Committee to request a hearing for his client. Mr. James McCormick, Vice-Chairman of the School Committee, responded for the School Committee by demanding proof of parental consent. Edward Riseman's parents wrote to Dr. Creedon assuring him that Edward Riseman had their permission to appear before the Committee.

On June 17, 1970, Edward Riseman appeared before the School Committee. A question arose as to the type of literature involved but Mr. Sweeny, a member of the Committee, said that the content was irrelevant, and that the issue was whether school policy should be changed to permit distribution of material of any kind through the school system without proper approach to the School Committee. The School Committee unanimously decided to deny permission to distribute leaflets on the basis of the existence of Rule 4.17, entitled "Advertising in the Schools," which provides in part:

> pupils, staff members, or the facilities of the school may not be used in any manner for advertising or promoting the interests of any school or non - school agency or organization, without approval of the School Committee." (The full text of the rule appears in Appendix p. 21A)

Plaintiff Edward Riseman desires to distribute leaflets and printed matter pertaining to issues of import and interest in school during the school year. He is willing to comply with reasonable regulations governing time, place and manner of distribution.

ARGUMENT

1. THIS COURT HAS JURISDICTION OF PLAINTIFFS' APPEAL.

On September 25, 1970, plaintiffs filed their appeal to this Court from the failure of the district court to grant their Motion for a Temporary Injunction. The appeal was filed under 28 U.S.C. § 1292 (a) (1) which provides that Courts of Appeals shall have jurisdiction of appeals from "interlocutory orders of district courts ... refusing or dissolving injunctions ...."

Although some courts have held that the denial of a temporary restraining order is not an appealable order, this Court has ruled that "a temporary restraining order is included within the meaning of 'injunction' as used in..." 28 U.S.C. § 1292 (a) (1), and it is, therefore, an appealable order. Alloyd General Corp. v. Building Leasing Corp; 361 F. 2d 359, 362 n.10 (1st Cir. 1966). Moreover, the district court's order, which for some inexplicable reason was labeled Temporary Restraining Order, was actually an order issued after a hearing in which injunctive relief was sought. The proceedings in the court below were in fact injunctive proceedings because:

1) the relief sought by plaintiffs in their motion was an "injunction". (Appendix p. 3A).

2) the order to show cause, issued by the district court, stated that the hearing would determine whether an "injunction" would issue. (Appendix p. 24A).

3) the proceeding in the district court was not ex parte; both parties were heard and defendants had over one month's notice (see certificate of service dated August 20, 1970, attached to Motion for a Temporary Injunction, Appendix p.5A),

and thus defendants had an adequate opportunity to prepare for the hearing.

4) the order issued by the district court did not, by its own terms, expire within a short period of time as is usually the case with a temporary restraining order.

5) the district court did not set a date to hear the motion for injunctive relief, indicating further that its order was intended to be the final interlocutory order issued prior to a trial on the merits.

Other Courts of Appeals, in cases similar to the present case, have held that the denial of a Temporary Restraining order is appealable when the order is the functional equivalent to the denial of injunctive relief. Thus, in Dilworth v. Riner, 343 F. 2d 226, 229 (5th Cir. 1965), the Court held that a district court's denial of a restraining order in a proceeding in which the plaintiffs had specifically requested a restraining order was appealable in that the proceeding was not ex parte, counsel for both parties argued the case, and evidence was presented. In addition, it has been held that where the restraining order issued by the district court does not expire within twenty days, as in the present case, the order is appealable. National Mediation Board v. Airline Pilots Assn'. Internat., 323 F. 2d 305 (D.C. Cir. 1963); Pan American World Airways v. Flight Engineers Internat., 306 F. 2d 840, 843 (2d Cir. 1962). Finally, it has been held that where the denial of a temporary restraining order determines substantial rights of the parties which will be irreparably lost if review is delayed, the order is appealable. United States v. Wood, 295 F. 2d 772, 778 (5th Cir. 1961).

The criterion set forth in the Wood case -- the determination of substantial rights and irreparable harm -- are certainly met in the present case where the issues concern the denial of First Amendment rights and irreparable harm is suffered each day that those rights are not fully protected. An analagous case, Woods v. Wright, 334 F. 2d 374 (5th Cir.), involved an appeal from the refusal of the district court to issue a temporary restraining order to prevent a student from being denied a public school education by his suspension from school without a hearing. The Court held that since the harm being suffered, loss of school, was irreparable and the rights involved were substantial, procedural due process, the order of the district court was appealable. The present case is the reverse side of Woods. In Woods the student had been suspended from school. In the present case, the student would have been suspended from school if he had chosen to exercise his First Amendment rights. Instead, the student here chose to remain in school and to give up his fundamental rights while litigating those rights in court. The student in the present case, as compared to the student in Woods, certainly should not have the determination of his rights delayed solely because he chose to litigate while remaining in school.

II. THE PLAINTIFF WAS UNCONSTITUTIONALLY DENIED HIS RIGHT TO DISTRIBUTE LEAFLETS IN SCHOOL.

Any analysis of a student's rights within a school must begin, of course, with Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969). In Tinker, the plaintiffs were expelled from high school for wearing black armbands in protest to the Vietnam War. The Court held that such expression was protected by the First Amendment and that expulsion of the students was, therefore, unconstitutional. In its opinion, the Court stated that the only bases upon which school officials may act to restrict the right of students to express themselves within the schools are "facts which might reasonably have led school officials to forecast substantial disruption or material interference with school activities." Id. at 514.

In the present case, the ban imposed by school officials on the distribution of literature is not based upon any reasonable forecast of disruption. It is based upon a long standing school committee rule (Appendix p. 21A) against advertising in the schools, and that rule applies to all literature irrespective of its contents (Appendix p. 21A, 23A). It is, therefore, clear, even if Tinker is read in a restrictive manner, that defendant's rule, by leaving no room for evaluation of disruption, is unconstitutional.*

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* Rule 4:17 of the School Committee on its face, accords the Committee an undefined discretion to permit advertising to be distributed within the schools. Based upon the response to plaintiffs's request, it is plain that discretion will not be exercised for the distribution of literature perceived to be political.

This Court has, on two recent occasions, recognized that a student's fundamental constitutional rights are not left behind when he enters the school house door. In Richards v. Thurston, 424 F. 2d 1281 (1st Cir. 1970), this Court held school officials may not constitutionally suspend a high school student for wearing long hair. In Keefe v. Geanakos, 418 F. 2d 359 (1st Cir. 1969), this Court held that a high school teacher could not be fired for using "... a 'dirty' word for demonstrated educational purposes, ..." Id. at 361. The Court's decision was based upon the principle of academic freedom which necessarily was the teacher's right to teach as well as the students' right to learn. In the present case, plaintiffs also seek the right to learn; that is, the right to learn from one another by the free exchange of ideas through the distribution of literature. That a school system should permit such activity seems not only desirable, but necessary for the building in which the students learn to be called "school." As the Supreme Court stated in Tinker at 512, the established constitutional right of free expression:

> ... is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. (emphasis supplied).

In other recent cases, Courts have held that high school students have a constitutional right to distribute literature within their school. In the first Court of Appeals decision, Scoville v. Board of Education of Joliet Township High School District 204, 425 F. 2d 10 (7th Cir. 1970), the Court held unconstitutional the expulsion of high school students who sold an underground newspaper within the school. The Court stated that distribution of literature, even though severely critical of school officials, could not be prohibited within the school without a "showing that the action was taken upon a reasonable forecast of a substantial disruption of school activity" Id. at 13. The Court added:

> While recognizing the need of effective discipline in operating the schools, the law requires that the school rules be related to the state interest in the production of well-trained intellects with constructive critical stances, lest students' imaginations, intellects and wills be unduly stifled or chilled. Id. at 14.

In Sullivan v. Houston Independent School District, 307 F. Supp. 1328 (S.D. Texas 1969), a case similar to Scoville, involving the distribution of a newspaper in a high school, the Court held:

> Freedom of speech, which includes publication and distribution of newspaper, may be exercised to its fullest potential on school premises so long as it does not unreasonably interfere with normal school activities. Id. at 1340

See also, Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Dickey v. Alabama Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967); Eisner v. Stanford Board of Education, _____ F. Supp. _______ (D.C. Conn. July 2, 1970). For a general discussion, see Nahmod, Beyond Tinker: The High School As An Educational Public Forum, 5 Harv. Civil Rts. - Civil Libs. L. Rev. 278 (1970).

ARGUMENT

III. RULE 4.17 OF THE QUINCY SCHOOL COMMITTEE IS SO VAGUE THAT IT VIOLATES DUE PROCESS AS EMBODIED IN THE FOURTEENTH AMENDMENT.

Rule 4.17 of the Quincy School Committee reads as follows:

> "Pupils, staff members, or the facilities of the school may not be used in any manner for advertising or promoting the interests of any community or non-school agency or organization without the approval of the School Committee. Exceptions to the above rule are:
>
> a. The Superintendent of Schools may cooperate in the many activities of the community providing such operation does not infringe on the school program or diminish the amount of time devoted to the school program.
>
> b. The Superintendent of Schools may authorize the use of films and materials or programs where the educational value of the material considerably offsets any incidental advertising disadvantages.
>
> c. Appropriate advertising may be sold for the school publications."

The Rule is entitled "Advertising in the Schools," which suggests that it might be limited to commercial leaflets rather than clearly political matters involved here. In addition, the words, "using pupils", "advertising", "promoting the interests of", and "community" are ill-defined. A student in the Quincy public schools desirous of distributing printed materials relating to public issues could not possibly be put on notice that such activity was prohibited from a reading of this rule. There is no reference to materials having to do with non-commercial issues of public import.

In Connolly v. General Construction Co., 269 U.S. 385, (1926), the Supreme Court set out the test to determine whether a law or regulation is so vague as to fail to give the notice required by the Due Process clause. The Court said:

> "...a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ to its application violates the first essential of due process of law." Id. at 391

See also Cox v. Louisiana, 379 U.S. 536 (1965).

The test has also been used to strike down vague rules and regulations in an educational setting. In the recent case of Soglin v. Kauffman, 295 F. Supp. 978 (W.D., 1968), aff'd 418 F. 2d 163 (7th Cir., 1969), the Court struck down as unconstitutionally vague a section of the Laws and Regulations of the University of Wisconsin, which read in relevant part:

> "They (the students) may support causes by lawful means which do not disrupt the operations of the university..."

In its decision, the District Court stated:

> "Neither the element of intention, nor that of proximity of cause and effect, nor that of substantiality, for example, is dealt with by its language. Nor does it contain even the most general description of the kinds of conduct which might be considered disruptive of the operations of the university, nor does it undertake to draw any distinctions whatever as among the various categories of university 'operations.'" Id. at 992

Just as the Wisconsin regulation failed to adequately define the elements of disruptive behavior, the rule of the Quincy School Committee fails to specify the kind of activity prohibited.

ARGUMENT

IV. RULE 4.17 OF THE QUINCY SCHOOL COMMITTEE IS UNCONSTITUTIONALLY OVERBROAD.

The United States Supreme Court has voided statutes on the grounds that they offended the Constitution by being overbroad, stating that:

> "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. NAACP v. Ala. ex rel Flowers, 377 U.S. 288, 307 ..." Zwickler v. Koota, 389 U.S. 241, (1967).

The Court is particularly concerned with the possible overbreadth of a statute or regulation which operates in the field of the First Amendment.

> "Broad prophylactic rules in the area of free expression are suspect ... Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415; 438 (1963).

Rule 4.17 has been applied by the Quincy School Committee to political expression by a citizen of the United States, however youthful he may be, which was peaceful and non-disruptive. The very existence of such a wide-ranging rule in an educational setting cannot fail to have a chilling effect on free inquiry and expression by both students, faculty and members of the community at large.

On its face, Rule 4.17 encompasses almost every activity which could take place in the school. Supplemental course materials that were selected by a teacher might have to be submitted to the School Committee for approval before used in a classroom. Guest lecturers or debates which explore interests of different sub-communities in our nation which a teacher or student organization might wish to include in a school program are vulnerable to censor by the School Committee. At best this rule creates a cumbersome bureaucracy; at worst, a dragnet of censorship over legitimate school activities.

V. RULE 4.17 OPERATES AS A CONSTITUTIONALLY INVALID PRIOR RESTRAINT ON FREEDOM OF EXPRESSION.

Rule 4.17 requires students to submit material to the School Committee in advance of distribution for approval of content. Such a requirement constitutes a prior restraint on expression and as such violates the first Amendment.

The leading Supreme Court case of Near v. Minnesota, 283 U.S. 697 (1931) established that:

> Liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from prior restraints or censorship. Id. at 717.

Near details the historical and philosophic underpinings for the policy against prior restraint.

> "The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."
> Ibid.

Restraint of expression is justified only when there is a clear and present danger of action of a kind the State legitimately may prevent and punish. Schenck v. U.S. 249 U.S. 47 (1919); Terminiello v. Chicago 337 U.S. 1 (1959).

Tinker well expresses the applicability of the first Amendment to the school environment; both teachers and students retain their rights to communicate to one another in school. "Mere undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker v. Des Moines Independent School District, op. cit., Terminiello v. Chicago, op. cit.

The principles enunciated in Tinker have been upheld in cases arising in the educational context. In Eisner v. Stamford Board of Education, _____ F.Supp._____, (D. Conn. Jul. 2, 1970), students were prevented by the Board of Education from distributing a school newspaper on school premises. The Board of Education had a rule similiar to Rule 4.17 of the Quincy School Committee which required advance approval by the school administration. The Court held that such a rule was a prior restraint of speech and press in violation of the First Amendment. The Court noted that the Board of Education has the right to punish conduct according to the standard established by Tinker, op.cit., but that:

> "this right and duty does not include blanket prior restraint. The risk taken if a few abuse their First Amendment rights of free speech and press is outweighed by the far greater risk run by suppressing free speech and press among the young. The remedy for today's alienation and disorder among the young is not less but more free expression of ideas." Eisner, op.cit.

In Antonelli v. Hammond, 308 F. Supp. 1329 (D.Mass. Feb.5, 1970), the Court held that prior submission to the faculty advisory board of material intended to be published in the student newspaper of a state college cannot be required without violating the Constitution. There the court indicated that the standards of the public forum must be applied in the educational context unless there is a showing of so much greater harm that restrictions are justified. In Zucker v. Panitz,299F.Supp.102 (S.D.N.Y.1969), a high school principal was enjoined from interfering with students' rights to place advertisements of their political opinions in the school newspaper. See also Brooks v. Auburn University, 296 F. Supp. 188 (M.D.Ala.1969).

While statutes imposing censorship or licensing upon writings have been held to be unconstitutional on their face, Lovell v. Griffen, 303 U.S. 444 (1938); Largent v. Texas, 318 U.S. 418 (1943); Staub v. City of Baxley, 355 U.S. 313 (1958), the United States Supreme Court has allowed that prior approval may be appropriate for some forms of communication, notably films which are ordinarily scheduled for public viewing far in advance so that a review procedure would not delay communication, Freedman v. Maryland, 380 U.S.51 (1965). Even in that context, "prior restraint comes to the Court bearing a heavy presumption against its constitutional validity," Bantam Books v. Sullivan, 372 U.S. 58 (1963). Unlike film, leaflet distribution is immediate communication, particularly where the leaflets announce a political rally the next day.

The school administration could not require students to obtain approval of their ideas before they spoke to their classmates in the halls, lunchrooms, recreation areas or between classes and study periods about political matters such as an impending anti-war rally or proposed student rights in the schools. Leaflets are not analytically distinguishable from that form of pure speech and likewise cannot be censored.

However, assuming arguendo that prior restraint is permissible, the procedures of the Quincy School Committee fail to meet Constitutional muster. In a proper prior review procedure, the censor must bear the burden of showing the expression to be unprotected according to a specific defined standard, there must be a specific time limit for the censor's decision, and there must be prompt judicial review before the censor's decision can have finality binding on the communicator. These were the standards established in Freedman v. Maryland, op.cit.

The Quincy School Committee had no time limit for their review of Edward Riseman's request for permission to distribute his leaflets. Over two months elapsed from the day Edward Riseman first attempted to communicate with his teachers and classmates and first requested permission from his principal to the date the School Committee held a hearing and rendered their decision.

The burden fell completely on Edward Riseman to seek review of the decision of the principal and to convince the School that his leaflets were permissible expression. There was no established procedure for review and at several points additional requirements for obtaining administrative review were imposed on Edward Riseman. His principal told him to request review by the School Superintendent. When he did that, the Superintendent, Dr. Creedon told him the request must be in writing. Although Edward Riseman submitted a request for hearing on May 1 to Dr. Creedon, no hearing was set. Plaintiff contacted an attorney who requested a hearing in writing on May 19. The School Committee responded on May 26 by demanding parental consent before setting a hearing date. When this was promptly supplied on May 30, the hearing was set for June 17. There was no showing by the school of facts justifying suppression, although such an evidentiary hearing is constitutionally required by Freedman and Tinker.

Plaintiff was advised by letter on June 18 that permission had been denied because of the Committee's policy prohibiting the advertising or promoting of interest of any community and that the denial was not based on an assessment of the materials. There was no other explication of the standard applied. The Supreme Court has voided censorship which applies insufficiently defined standards, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495(1952). At no point in the procedure was there provision for judicial review, despite the fact that plaintiff was prevented from exercising his right of expression. The absence of judicial review as an integral part of a censorship scheme alone is sufficient to void the procedures.*

The inordinate delays, the uncertainty and burden which plagued Edward Riseman and prevented him from communicating with his schoolmates illustrate the dangers of a system of prior restraint.

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*This is not to say that a School Committee cannot protect its legitimate interests. It could, in an appropriate case, assume the burden of establishing that the expression is unprotected and seek judicial determination in the State Supreme Judicial or Superior Courts as authorized by Massachusetts General Law Chapter 214, Section 1 and Chapter 231A, Section 1.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully submit they are entitled to the injunctive relief sought in the complaint.*

By their attorneys,

MICHAEL ALTMAN
Boston Legal Assitance Project
474 Blue Hill Avenue
Dorchester, Massachusetts 02121

CAROLYN R. PECK
Center for Law and Education
38 Kirkland Street
Cambridge, Massachusetts

Date ______________________ Attorneys for Plaintiff

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* Plaintiffs request that instructions to the District Court include directions to allow plaintiffs to proceed in forma pauperis consistent with the Order of the Circuit Court (Appendix 35A)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7715

EDWARD RISEMAN ET AL.,
Plaintiffs, Appellants,

v.

SCHOOL COMMITTEE OF THE CITY OF QUINCY ET AL.,
Defendants, Appellees.

Before ALDRICH, Chief Judge,
McENTEE and COFFIN, Circuit Judges

ORDER OF COURT

Entered on November 3, 1970

This cause came on to be heard on plaintiffs' appeal from the district court's failure to grant the temporary injunction requested, pending a decision on the merits, and after hearing it is ordered and decreed as follows:

Pending final determination of this case, or until further order of this court, the Quincy Public Schools shall not enforce a regulation prohibiting absolutely the distribution on school ground, which includes within the buildings, by students of leaflets, brochures, or other written forms of expression. Students shall have the right to engage in orderly and not substantially disruptive distribution of such papers. provided that neither the distributors nor the distributees are then engaged, or supposed to be engaged, in classes, study periods, or other school duties. Nothing in this order shall prevent the principal of any school from promulgating reasonable rules setting forth in detail the times, places within the school, and manner that such matter may be distributed, provided that no advance approval shall be required of the content of any such paper. However, the principal may require that no paper be distributed unless, at the time the distribution commences, a copy thereof, with notice of where it is being and/or is to be distributed, be furnished him, in hand if possible.

By the Court:

/s/ Dana H. Gallup
Clerk

A True Copy

CIRCUIT COURTS SPLIT ON PRIOR RESTRAINT OF HIGH SCHOOL NEWSPAPERS AND POLITICAL PAMPHLET DISTRIBUTION

Riseman v. School Committee of Quincy, 439 F.2d 148 (1st Cir., Mar. 11, 1971);
Eisner v. Stamford Board of Education, 440 F.2d 803 (2nd Cir., Mar. 5, 1971).

These two recent cases involve school officials' attempts to impose prior restraints upon student expression within public schools. *Riseman* condemns such restraint. *Eisner*, while paying homage to the precious nature of the First Amendment, goes far toward emasculating it in the crucial forum of the school.

In *Riseman*, a junior high school student was prevented by his principal from distributing in school an anti-war leaflet and "A High School Bill of Rights." He sought permission from the School Committee to make future distributions and, after evasion and months of delay, permission was denied on the basis of a regulation prohibiting in-school distribution of material by students.

The student sued in federal district court, and the court restrained school authorities from interfering with orderly distribution on school premises *outside* the school buildings. In the belief that some minimal exchange of ideas is desirable *within*, as well as without, the public schools, the plaintiff appealed. [1] Observing that its task was the "regrettably no longer novel [one] of securing the exercise of First Amendment rights of students against unrestricted encroachment by school authorities," the Court of Appeals reversed the lower court and broadened the restraining order to include non-disruptive distribution *within* school buildings. Although it was permissible for school

> Nothing in this order shall prevent the principal of any school from promulgating reasonable rules setting forth in detail the times, places within the school, and manner that such matter may be distributed, provided that no advance approval shall be required of the content of any such paper. However, the principal may require that no paper be distributed unless, at the time that the distribution commences, a copy thereof, with notice of where it is being and/or is to be distributed, be furnished him, in hand if possible. [Order of the Court, November 3, 1970; cited in opinion, 439 F.2d 148, 149, note 2].

Eisner began much the same as *Riseman*: high school students attempted to distribute a student newspaper in school. Although there was no evidence of trouble, school authorities stopped the distribution under a rule prohibiting "using pupils for communications." *Eisner v. Stamford*, 314 F. Supp. 832, 833 (D. Conn. 1970). The students sued in federal district court, June 23, 1969; thereafter (Nov. 18, 1969), the School Committee scuttled the no-communications rule and brought forth some slightly more cosmetic regulations, summarized as follows:

> 1) No student may "distribute" written matter on school grounds or in school buildings without prior approval of "the school administration."
>
> 2) Material shall not be approved if, "either by its *content* or by the manner of distribution itself," it interferes with the proper and orderly operation of the school, will cause violence or disorder, "or will constitute an invasion of the rights of others" [emphasis added].

The district court held that these regulations were overbroad and constituted an invalid prior restraint on student expression. Moreover, no adequate procedural safeguards mitigated the dangers of censorship. It was not clear to whom the materials had to be submitted for approval; there was no definite time within which a decision had to be made; nor was there any right to a hearing to determine contested factual questions, nor any right to appeal. As in *Riseman*, the district court concluded that school authorities could regulate the time, place, and manner of distribution of written materials but could not require advance approval of the *content*. In the court's view misconduct could be punished through normal school discipline procedures if it actually occurred; a slightly greater risk of misconduct did not justify prior censorship:

> . . . the risk taken if a few abuse their First Amendment rights of free speech and press is outweighed by the far greater risk run by suppressing free speech and press among the young. *Eisner v. Stamford Bd. of Ed.*, 314 F. Supp. 832, 836 (D. Conn. 1970).

In *Eisner*, the 2nd Circuit Court of Appeals modified the district court's order, and, as modified, affirmed. This modification was so complete, however, that it amounted to a reversal of the district court. The regulation was upheld against charges of overbreadth, vagueness and prior restraint, except that the word "distribution" had to be changed to "substantial distribution" to exclude an exchange of notes between two students.

Citing *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 514 (1969), which said in dictum that student activities may be prohibited if school authorities "reasonably forecast *substantial* disruption . . ." [emphasis added], the *Eisner* court held that the School Committee regulation embodied the *Tinker* rule, and was therefore lawful. The court further found that any vagueness or overbreadth in the phrase "invasion of the rights of others" – which, in the court's words, "is not a model of clarity and preciseness" – was somehow cured by the fact that "the statement does not attempt to authorize *punishment* of students who publish literature that under the policy may be censored by school officials." This almost seems to imply that the court is inviting students to violate the regulation. And is it possible that school officials do not intend to punish students who violate it?

The Court also appeared to find solace in its faith that school officials would not act unconstitutionally, no matter how facially broad their regulations and no matter how bad their previous conduct with respect to students' attempts to express themselves:

> Although the policy does not specify that the foreseeable disruption be either 'material' or 'substantial' as *Tinker* requires, we assume that the Board would never contemplate the futile as well as unconstitutional suppression of matter that would create only an immaterial disturbance. 440 F.2d 803 at 808.

Contrary to the court's "assumption," however, school officials in this very case had attempted the futile and unconstitutional suppression of a student paper when there was no evidence of the slightest disturbance: the illegality of the suppression had been conceded on appeal. One may wonder how "futile" the suppression was when it took students over a year to obtain relief after filing suit. Doubtless some students had already graduated, and timely opportunities to speak out on issues had been lost. The same frustration and delay had occurred in *Riseman*. It is the rule rather than the exception where students are forced to wage legal battle with the authorities and resort to the difficult and cumbersome machinery of the courts.

The Court of Appeals agreed with the District Court that the regulation was procedurally defective. It disagreed that a hearing should be required, however, because hearings would be unduly burdensome on school officials, and unnecessary since the authorities would have to justify suppression if students chose to litigate.[2] What the Court fails to recognize is that most students never litigate and are simply silenced by the plenary power which school authorities exercise over their lives. Indeed, even in rare cases where students do initiate a suit, it is often of marginal relevance to what occurs in the school each day.

The decision thus leaves students with little protection against arbitrary suppression of unpopular or minority viewpoints – the natural and overwhelming tendency of those in official authority. [See, e.g., John Stuart Mill, *On Liberty* 129 (Liberal Arts Press 1956); Emerson, *Toward A General Theory of the First Amendment*, 3-15; *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting)]. It also makes hollow the notion that "The classroom is particularly the 'market place of ideas' . . . ." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). One can hope that, of the positions taken by the two courts, *Riseman* will predominate.

Attorneys for the plaintiff in *Riseman* were Michael Altman, Boston Legal Assistance Project, 474 Blue Hill Avenue, Roxbury, Massachusetts 02121, and Carolyn Peck of the Center for Law and Education.

Attorneys for the plaintiff in *Eisner* were Alan H. Levine, New York Civil Liberties Union, 84 Fifth Avenue, New York City 10011; and Monroe Silverman and Stephen M. Seelig, 25 Bank Street, Stamford, Connecticut.

Jeffrey Kobrick

FOOTNOTES

[1] The plaintiff moved for a "temporary injunction" in district court in order to trigger a prompt hearing and at the same time avoid problems that sometimes arise in attempting to appeal the denial of a "restraining" order. Under 28 U.S.C. § 1292 (a) (1) Courts of Appeals have jurisdiction of appeals from "interlocutory orders of district courts . . .refusing or dissolving *injunctions*" [emphasis added]. In *Riseman* the Court of Appeals held that it had jurisdiction of plaintiff's appeal because a "hearing" had been held below and a "preliminary injunction" against interference with in-school distribution denied. The hearing had consisted of plaintiff's affadavit and oral argument of counsel in chambers. The Court of Appeals thus takes a liberal view of the kind of hearing that will allow immediate appeal in an injunction case involving First Amendment rights. Those rights could have been irreparably damaged by delay following inadequate relief at the district court level.

[2] The procedural modifications required by the Court were the designation of the specific person to whom materials had to be submitted and specification of a definite short time limit for decision.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JON EISNER ET AL.,

Plaintiffs

CIVIL NO. 13220

v.

THE STAMFORD BOARD OF
EDUCATION ET AL.,
Defendants

MEMORANDUM OF DECISION

The parties' cross motions for summary judgment present the question whether a student newspaper may be distributed in a public high school without the necessity of it being submitted to the shcool administration for prior approval of its contents.

I.

The pertinent facts are undisputed. The plaintiffs, students at Rippowam High School, a public high school in Stamford, Connecticut, are authors and publishers of an independent mimeographed newspaper entitled "Stamford Free Press." The newspaper is printed at the students' expense and expresses their views upon current controversial subjects. Three issues of the newspaper were distributed beyond school limits without incident. After there was an attempt to circulate a fourth issue on school grounds, school officials, named defendants herein, warned the students they would be suspended if the activity continued. In existence at the time was a regulation passed by the Board of Education which prohibited "using pupils for communications." When negotiations between the students and administration failed to resolve the dispute, this suit was instituted on June 23, 1969.

Thereafter, on November 18, 1969, the Board of Education restated its policy on the matter with the following enactment:

> Distribution of Printed or Written Matter
>
> The Board of Education desires to encourage freedom of expression and creativity by its students subject to the following limitations:
>
>> No person shall distribute any printed or written matter on the grounds of any school or in any school building unless the distribution of such material shall have prior approval by the school administration.
>
> In granting or denying approval, the following guidelines shall apply:
>
>> No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.

The plaintiffs contend this regulation contravenes the guarantee of freedom of speech and press under the First Amendment. The defendants, on the other hand, argue that the regulation is a valid exercise of the Board's inherent power to impose prior restraints on the conduct of school children.

II.

At the outset it is important to stress what is not contested in this lawsuit. The plaintiffs acknowledge that the school authorities may, and indeed must at times, control the conduct of students. To this end the administration has the power and the duty to promulgate rules and the appropriate guidelines for their for their application. More specifically with respect to this case, the plaintiffs concede the defendants possess the authority to establish reasonable regulations concerning the time, exact place in the school, and the manner of distribution of the newspaper, and to insist that each article identify its author.

Moreover, the plaintiffs do not challenge the Board's power to issue guidelines on the permissible content of the newspaper. For example, they do not object to a prohibition of obscene or libelous material. They further recognize that the Board has the duty to punish "conduct by the student, in class or out of it, which for any reason - whether it stems from time, place or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others ....." Tinker v. Des Moines School District, 393 U.S. 503, 513 (1969).

The only issue before the Court concerns the constitutional validity of the requirement that the content of the literature be submitted to school officials for approval prior to distribution.

III.

Viewing the regulation in question solely on its face, it seems clear to the Court that the regulation is a classic example of prior restraint of speech and press which constitutes a violation of the First Amendment. In Near v. Minnesota, 283 U.S. 697 (1931), the Supreme Court stated:

> The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to

> prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure fore criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases befor the public; to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity." . . . . . The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, "The great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." . . . This court said, in *Patterson v. Colorado*, 205 U.S. 454, 462: "In the first place, the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare . . . . ."
>
> 283 U.S. at 713-714.

The Court then further confirmed that: ..." [L]liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." *Id.* at 716.

See also Lovell v. Griffin, 303 U.S. 444 (1938).

Although no case precisely on point has been found, several recent rulings give strong support to this Court's opinion. In Antonelli v. Hammond, ______ F. Supp. __________ (D. Mass. February 5, 1970), Judge Garrity in a reasoned opinion held that the prior submission to a faculty advisory board of material intended to be published in the student newspaper of a state college cannot be constitutionally required. In Zucker v. Panitz, ______ F. Supp. ______ (S.D.N.Y. 1969), a summary judgment was granted enjoining a high school principal from interfering with the right of students to place advertisements of their political views on the Vietnam conflict in the school newspaper. And in Brooks v. Auburn University, 296 F. Supp. 188 (M.D.Ala. 1969), the court observed, at 196, that: "...(t)he State of Alabama cannot, through the President of Auburn University, regulate the content of the ideas students may hear. To do so is illegal and thus unconstitutional censorship in its rawest form." See also Sullivan v. Houston Independent School District, 307 F.Supp. 1328 (S.D.Tex. 1969).

IV.

The right of students to freedom of expression, however, is not absolute. The "heavy presumption" against restrictive regulations on free speech and press, Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963), may be overcome "in carefully restricted circumstances." Tinker v. Des Moines School District, supra at 513. School administrations of necessity must have wide latitude in formulating rules and guidelines to govern student conduct within the school. If there is "a specific showing of constitutionally valid reasons to regulate their speech," Id. at 511 , students must conform to reasonable regulations which intrude on that freedom. Free speech is subject to reasonable restrictions as to time, place, manner and duration. Id. at 512-513. See also Shuttleworth v. Birmingham, 382 U.S. 87 (1965): Cox v. Louisiana, 379 U.S. 536 (1965).

In the present case, the defendants have not produced a scintilla of proof which would justify the infringement of the students' constitutional rights to be free of prior restraint in their writings. The contents of the issues of the "Stamford Free Press" submitted to the Court are infinitely less objectionable than the underground newspaper "Grass High," involved in Scoville v. Board of Education, ____F. 2d____(7 Cir. 1970), and the personal conduct and attitude of the plaintiffs herein have been commendable.

Moreover, even assuming the defendants carried their burden and demonstrated the necessity for prior restraint, the regulations provide none of the procedural safeguards designed to obviate the dangers of a censorship system. Freedman v. Maryland, 380 U.S. 51, 58 (1965). Cf. Powe v. Miles, 407 F.2d 73, 84 (2 Cir. 1968). Among other things, the regulations do not specify the manner of submission, the exact party to whom the material must be submitted, the time within which a decision must be rendered; nor do they provide for an adversary proceeding of any type or for a right of appeal.

V.

Finally, the Court is convinced that reasonable regulations can be devised to prevent to prevent disturbances and distractions in Rippowam High School and at the same time protect the rights of the plaintiffs to express their views through their newspaper. The Board of Education has the duty under the Connecticut law, and the right under Tinker, to punish "conduct by the student, in class or out of it, which for any reason - whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Tinker at 513. But this right and duty does not include blanket prior restraint; the risk taken if a few abuse their First Amendment rights of free speech and press is outweighed by the far greater risk run by suppressing free speech and press among the young. Cf. Terminiello v. Chicago, 337 U.S. 1 (1949).

The remedy for today's alienation and disorder among the young is not less but more free expression of ideas. In part, the First Amendment acts as a "safety valve" and tends to decrease the resort to violence by frustrated citizens. See Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Emerson, Toward a General Theory of the First Amendment 11-15 (1967). Student newspapers are valuable educational tools, and also serve to aid school administrators by providing them with an insight into student thinking and student problems. They are valuable peaceful channels of student protest which should be encouraged, not suppressed.

Accordingly, for the reasons stated, the Court hereby grants plaintiffs' motion for summary judgment.

Dated at New Haven, Connecitcut, this 2nd day of July, 1970.

Robert C. Zampano
United States District Judge

Steve Schneider
68 West Walnut Park
Boston, MA 02119

Dear Steve:

As we understand your problem, you wish to have an assembly for the purpose of presenting information about the workings of the draft, opportunities for alternative service and the law of conscientious objection, subsequent to an assembly arranged by the school in which representatives of the armed forces presented information about opportunities and careers in the armed forces.

In our considered opinion:

1) No legal problems are raised by your request or by an invitation to speakers for orderly assemblies or meetings whatever their views. On this subject guidelines of the Commissioner of Education, Neil V. Sullivan, (attached) are applicable. They state that students and teachers do not shed their constitutional rights at the schoolhouse gates, particularly when First Amendment rights of expression and assembly are involved. Under topic 7a the guidelines note that teachers are given particular responsibility for exposing students to the expression of differing views.

2) While the school department or headmaster may make reasonable regulations for speakers and assemblies, it is beyond their power, without compelling justification, to interfere with the first amendment rights to learn, express, or assemble. The primary test of such a justification would be disruption of the educational process. Your proposal seems rather to enhance the educational process.

3) In your situation, where school authorities have already organized an assembly for the presentation of information and views on one side of the issue of the form and conditions of service to the country, presentation of differing views and new information is not only permissible, it is a matter of fairness and equal time. We believe that a reasonable request by some faculty and students for such an assembly could not be refused without significantly impairing your First and Fourteenth Amendment rights. The Commissioner's guidelines (6) specifically note that "In cases of controversial topics or speakers, presentation should be balanced in terms of existing major points of view." Further, the federal courts have dealt with such issues in the context of universities and have found that "Regulations may not be used to deny either the speakers or the listeners equal protection of the laws by discriminating among speakers according to the orthodoxy or popularity of their political or social views." (Brooks v. Auburn University, 296 F. Supp. at 494.) School regulations of first amendment expressions must be limited to housekeeping matters such as scheduling. Riseman v. Quincy

School Comm., F. 2d (1st Cir. March 11, 1971.)

4) We therefore conclude that you are within your rights and obeying your responsibilities as teachers to request, with students, such an assembly; and that if such request makes provision for orderly assembly, school authorities would be ex their authority if they refused to make time and space available in these circumstances.

Sincerely,

Carolyn R. Peck
Stephen Arons
Staff Attorneys

Sister Stella
Fontbonne Academy
930 Brook Road
Milton, Massachusetts

Dear Sister:

Nancy Fleming, a senior at Fontbonne Academy, has asked me to write you concerning her constitutional rights to publish and distribute literature in the school. She is an editor of the school magazine Ellipsis and wishes to publish it free from school censorship. She has also asked whether she may distribute a student newspaper inside the school.

In my considered judgment, the First Amendment of the Constitution protects Nancy's right to publish and distribute in school both the magazine and the paper. School officials have no legal authority to censor the content of the magazine or paper or prohibit the publication of any ideas no matter how unorthodox or unpopular those ideas may seem. Only totalitarian societies seek to silence ideas or thoughts which displease those in authority. Such suppression is, of course, anathema to a democratix society.

Several recent federal court cases have held that the First Amendment applies to students in school. In Scoville v. Board of Education, 425 F.2d 10 (7th Cir. 1970), for example, the federal court ruled that severe criticism of school officials published by students in school was protected expression. (Scoville held that students publishing the materials could not be punished or disciplined for exercising their First Amendment rights).

And recently, the highest federal court in New England ruled that school officials may not require that materials containing student expression be submitted to school officials prior to their distribution in the school (although school officials could require that they be given a copy contemporaneously with the distribution). Riseman v. Quincy School Board, 1st Cir. Ct. of Appeals, March 12, 1971.

The right to publish and distribute student newspapers may be limited only by reasonable regulations as to the time and place of its distribution in the school. However, in Sullivan v. Houston Independent School District, 307 F. Supp. (S.D. Tex. 1969), the court indicated that trivial disruptions of school activities will not justify school officials in interfering with the orderly distribution of student materials. In Sullivan, school officials attempted to expel two high school students for distributing "Pflashlyte", a newsletter which criticized school officials. They passed out copies in the halls of their school between classes, at a local shopping center and at other commercial establishments. There was some evidence that the newsletter disturbed the classroom in minor ways: students left copies in the wrong places, a few students were caught reading it during class and teachers were often confiscating copies. The Court ruled that 1) the school had no business attempting to regulate off-campus student activity and 2) the on-premises activities involved such little interference with the learning process that disciplinary action against the distributors was unwarranted. Scoville v. Board of Education, supra, presents an almost identical case. Authorities attempted to take disciplinary action against two students for in school distribution of "Grass High", a newsletter they had published elsewhere. The federal court for the Seventh Circuit held that the distribution was constitutionally protected activity and school officials could not restrict it in the absence of proof that the action would "substantially disrupt or materially interfere with school procedures."

It is true that your school is a private rather than a public school. For purposes of constitutional requirements, however, this should make no difference. Education is, under Massachusetts law, compulsory; and since children are required to attend school by the state, the state has necessarily implicated itself in their schooling. The parochial schools are carrying out a public function, and are therefore no more free to disregard constitutional requirements in the free speech area than they would be to disregard, for example, the constitutional prohibitions against racial discrimination. See Burton v. Wilmington Parking Authority, 365 U.S. 296 (1966).

Furthermore, the Supreme Court has been particularly zealous in protecting the rights of free speech in areas which, although privately owned, are essentially similar to their publicly controlled counterparts in which free speech is protected. See Marsh v. Alabama, 326 U.S. 501 (1946) (privately owned company town); Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968). The courts regard free speech as such a fundamental right that they will not suffer its abridgment merely because the forum, otherwise appropriate, happens to be privately owned.

In conclusion, the right to express a belief or a point of view is essential to democratic government. The exercise of this right should be encouraged in young adults, particularly in school. The nation cannot expect its young citizens to contribute fully to the workings of the democracy if they have been taught only to parrot their teachers. Nancy's enterprise should be encouraged by all those interested in providing broad and meaningful educational experiences to young people.

Sincerely yours,

Jeffrey W. Kobrick
Staff Attorney

cc: Nancy Fleming

II. PERSONAL RIGHTS

AMERICAN CIVIL LIBERTIES UNION
156 Fifth Avenue
New York, New York 10010

April, 1970

MEMORANDUM

To: Affiliates

From: Legal Department

Re: Class Actions in Civil Liberties Cases

I. Introduction

We have become increasingly aware that our litigational efforts to defend and advance civil liberties are often hampered by the difficulties of enforcing a new principle which we have secured in a particular lawsuit. We succeed in establishing a precedent which is then ignored by similarly situated officials who were not parties to the original suit.

Thus, for example, an affiliate takes a case involving a high school student suspended for violating a rule or order prescribing "reasonable" appearance. The litigation is successful, but it only involved one school principal or district. While the favorable decision is theoretically *stare decisis* within the judicial district, it is a binding judgment only as between the parties to it. When the next student is disciplined for his appearance even by the same school official (though more probably by a different one in another school or district), we must initiate new litigation to secure the civil liberties of the second student.*

This memorandum urges utilization of the class action device, provided for in Rule 23 of the Federal Rules of Civil Procedure, as a method of insuring that civil liberties victories will not be hollow ones.

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* For example, the Illinois affiliate won a long-hair suit, then discovered that despite the favorable decision other schools continued to discipline students until a suit was brought against their school. Minutes of the November 6, 1969 Meeting, Board of Directors, Illinois Division, ACLU.

The memorandum urges increased use of the plaintiff's (or "unilateral") class action, and combined use of the defendant's class action in certain kinds of situations. (Though the memorandum focuses on hair and dress, the class action device, of course, has wider application.)

The civil rights movement has made effective use of the traditional plaintiff's class action as, for example, in bringing a class suit on behalf of all black school children in a particular area against the official or body responsible for that area. In such a case, securing a judgment on behalf of the class against certain defendants provides effective relief since if the defendant refuses to comply with the decision, any member of the class, though not a named party, can seek summary relief against the defendant without having to institute a *de novo* lawsuit.* Thus, the plaintiff's class action device can continue to be fruitfully utilized when the conduct complained of stems basically from a single official source.

Often, however, civil liberties violations come in the context of a widespread practice by many coordinated, independent officials. Long-hair cases are one example. Another involved racial segregation in all Alabama prison facilities, where a "bilateral" class action (that is, plaintiffs suing as a class against certain prison officials as representatives of all such officials in the state) was very successful.

Recent changes in Rule 23 suggest that if a class action is to be utilized, it may be advantageous, where the facts warrant, to bring it as a bilateral class suit.* The new Rule, however, provides that all members will be bound and, thus, there is a greater risk in using the plaintiff class action device. Consequently, once you decide to use the plaintiffs' class action, there is not an appreciably greater risk to making it bilateral where appropriate. Since all members of the class will be bound anyway if the plaintiffs' class action fails, suing the defendants as a class will make enforcement much easier if the plaintiff wins; each member of the defendant's class (e.g., all principals, all jailers) will be bound by the judgment. In other words, losing a bilateral class action is not much more disabling than losing a plaintiff's suit; winning a bilateral suit is much more advantageous.

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* The ACLU of Oregon recently filed suit on behalf of all blacks in Portland complaining of a systematic course of wrongful conduct by the police. The defendants were the Mayor, Chief of Police and several "John Doe" officers. Should the plaintiffs prevail, any member of the class who is thereafter abused can bring on a show cause order to hold the offending officer in contempt. Also, in Smith v. Hill, 285 F.Supp. 556 (E.D. N. C. 1968) a successful class action was brought on behalf of all Negroes, unemployed, and persons within the definition of a local vagrancy ordinance to invalidate that ordinance. The court did so, and it specified that the defendants were enjoined from enforcing the ordinance against any member of the plaintiff's class.

Of course, there are numerous factors to be considered in determining whether to bring either kind of class action. The risks involved in losing must be considered, since all members of the plaintiff's class are bound; new suits on the same issue are rendered improbable. Also, one must consider the added procedural difficulties in managing such a suit. On the other hand, the more likely a victory on the merits, the more beneficial a class action. Moreover, a class action can avoid mootness problems present in a non-class suit.

What follows is an analysis of the key requirements of Rule 23, set in the context of a long-hair suit.

II. An Analysis of Rule 23

Class actions in federal suits are controlled by the detailed provisions of Rule 23, F.R. Civ.P. The Rule is conceptually structured to apply to the plaintiff's class action. To bring a bilateral class action requires a showing of all the relevant requirements as to both plaintiff and defendant, see, _e.g._, _Technograph Printed Circuits, Ltd. v. Methode Electronics_, 285 F.Supp. 714 (N.D. Ill. 1968).

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* The "spurious" class action device, whereby a non-party member of the class could avail himself of a judgment in favor of his class even though he would not have been bound by an unfavorable judgment, was eliminated.

Designation of Classes

Plaintiff's Class - In a long-hair or dress code case, the most useful general class is all students affected by the regulation or rule, or by the pattern of discipline, rather than smaller sub-classes, such as of all students who had been disciplined for their long-hair or short skirts. The fact that all male students might not want to have long hair cannot defeat the class action. See _Snyder v. Board of Trustees_, 286 F.Supp. 927 (N.D. Ill. 1968); but _cf._ _Ward v. Luttrell_, 292 F.Supp. 165 (E.D. La. 1968) (suit on behalf of all women employees, challenging state law regulating hours of employment; class action disallowed).

Defendant's Class - Where there is a city-wide or district-wide regulation flatly prohibiting long-hair or sideburns, then the prime defendant would probably be the superintendent or board of education which promulgated the rule. Since the prohibition stems from a single source, a successful plaintiff class action would give effective relief. On the other hand, the more power which is vested in local principals, the more fruitful it would be to sue certain principals as class representatives. If the Court allows such a bilateral class action, and the plaintiffs win, then there will be a judgment enforceable against _all_ in the area (county, city, state).

In either situation, the actual parties must be representative of the class whose interest they assert, and that class must be capable of definition with some precision.

It must be emphasized that where a bilateral action is attempted, you must allege that the elements of the rule apply to both sides.

Section (a) - General Requirements

This section sets forth the mandatory prerequisites for allowing a class action.

(1) The class must be so numerous that the joinder of all members is impracticable.

On the plaintiff's side, this requirement should be simple to meet. Presumably there will be thousands of students subject to hair regulations. Whether the defendant's class is sufficiently large depends on the factual pattern in your area. There may be so few principals in the district that joinder would not be impracticable. For example, one decision refused to allow a class action where only six students had been denied procedural due process, see Jones v. State Board of Education of Tennessee, 279 F.Supp. 190 (M.D. Tenn. 1968), aff'd, 407 F.2d 834 (6th Cir. 1969), cert. dismissed, 38 U.S. Law Week 3317 (1969). Thus, when dealing with a handful of schools, a plaintiff's class action alone, with all principals as named defendants would be the easiest and most effective strategy.

(2) There are questions of law and fact common to the class.

Presumably most high schools in any given area will have regulations either adopted independently or mandated from a central source requiring that hair be of a "reasonable" length, prohibiting beards and mustaches, and regulating the length of sideburns. The constitutionality of such regulations would provide common First Amendment and privacy questions.* The same would probably be true of the defendant's class. That there might ultimately be differing factual questions as to each member of the class cannot defeat the class action. See Dolgow v. Anderson, 43 F.R.D. 472 (E.D. N.Y. 1968) (a suit by a few small shareholders complaining of stock transactions by corporate officials); Washington v. Lee, supra.

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* If a sizeable number of students had actually been disciplined, they might constitute a sub-class which could raise additional procedural due process issues.

(3) The claims or defenses of the representative parties must be typical of the claims or defenses of the class.

This requirement would be met since the representative plaintiffs would be asserting, for example, that the First Amendment guarantees of freedom of expression allow all students to wear their hair however they choose without fear of punishment. The representative defendants presumably would assert their common need for discipline and an uninterrupted educational process and argue that long hair undermines these objectives.

(4) The representative parties will fairly and adequately protect the interests of the class.

This provision aims at preventing collusive suits. The adequacy of representation by the plaintiffs can be demonstrated by rehearsing ACLU credentials in advancing the First Amendment rights of all students and setting forth the background of the attorneys who represent the plaintiffs and any other organizations which will be supporting the litigation.

Section (b) - Additional Alternative Tests

In addition to meeting all of the requirements of section (a) of the Rule, the potential class action must additionally come within at least one of the alternative provisions of section (b).

Section (b) (1) (A) allows a class action where the prosecution of separate actions by members of the class would create the risk of inconsistent adjudications establishing incompatible standards of conduct for the party opposing the class. Section (b) (1) (B) allows a class action where separate adjudications as to individual members of the class would, as a practical matter, be dispositive of the interests of the other members of the class. Subsection (A) might be available in the situation where there is a no-hair rule applicable throughout a school district encompassing perhaps two dozen high schools and presided over by a single superintendent, or where a series of independent districts have a substantially similar rule or prohibition. Subsection (B) arguably refers to the *stare decisis* effects which the decision would have, i.e., a decision regarding the constitutionality of long-hair regulations would, in practical terms, because of its precedential impact in the judicial district, effectively resolve the issue as to all students there, and thus the suit should be allowed to proceed as a class action. See *Snyder v. Board of Trustees of the University of Illinois*, 286 F.Supp. 927 (N. D. Ill. 1968) (class action allowed on behalf of all university students to void a ban on subversive speakers). Section (b) (1) was the basis for a bilateral class action in *Wilson v. Kelley*, 294 F.Supp. 1005 (N.D. Ga. 1968), challenging racial segregation in Georgia prison and jail facilities. The plaintiffs sued several state-wide officials in their official capacities, and three sheriffs and wardens as a class representing all wardens and jailers.

Section (b) (2) allows a class action if the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making injunctive or declaratory relief appropriate with respect to the entire class. This sub-division is uniquely applicable to long-hair suits. Indeed, the Advisory Committee on the Federal Rules notes that civil rights suits are especially illustrative of 23 (b) (2), and that the action or inaction referred to is deemed directed at the class even though it has taken effect or been threatened only with regard to a few members of the class, provided that the action is based on grounds generally applicable to the class. Thus, for example, the expulsion of one student for long hair and the threat to act similarly with regard to any other student who lets his hair grow would be sufficient to invoke this alternative condition. This provision is also an available basis for the bilateral class action where the factual situation warrants it.

Subpart (3), the final provision of section (b), is a catch-all allowing a class action when, although none of the other provisions of section (b) have been met, nevertheless the common questions predominate over issues pertaining to individuals _and_ the class action device is superior to any other method of resolution. This is a restatement of the previous Rule and is more discretionary with the court. See _Eisen v. Carlisle and Jacqueline_, 391 F.2d 555 (2d Cir. 1968). Demonstrating that common questions predominate should not be too difficult.

The other element requires a showing that the class action device is superior to any possible alternatives for protecting rights and resolving the dispute. In this regard, courts commonly consider four possible alternatives and require counsel proposing a class action to demonstrate their ineffectiveness. We think it can be argued that three of the alternatives, namely joinder, intervention and consolidation, are ineffective to protect students' First Amendment rights. All three presuppose that the individual student not only knows that his rights have been violated but can also afford counsel to assert them.

While students actually expelled would have a sufficient stake to want to take action, others might not know how to proceed. Moreover, as to all other students a good argument can be made that they would probably surrender to authority by cutting their hair or not letting it grow, rather than incur the expense and burdens which a lawsuit might entail. Since the primary purpose of allowing a class suit is to facilitate the assertion of rights on behalf of those who for reasons of economics or otherwise would have no other means of redress, it is most appropriate here.

The fourth alternative to preclude a class suit is the availability of the test case device. Presumably the defendants would argue that an individual test case on the issue would be sufficient and would not involve the procedural difficulties which a class action imposes on court and counsel. The answer is that even if one long-haired plaintiff prevails and establishes the general principle, other students might still have to resort to the expense and inconvenience of litigation to enforce the newly-created right as against their particular school official who might choose to disregard the judicial precedent. Experiences with school boards in ignoring judicial decisions concerning desegregation and school prayers can hardly make one sanguine about the prospects of compliance with judgments that technically do not bind them. Indeed, the inadequacy of the test case device was a substantial motivation for this memorandum.

Section (c) - Court Approval and Notice

At some point soon after the complaint is filed, the Court must specifically determine whether the suit can be maintained as a class action, and if so, what provisions for notice are to be made. The section also deals with the effect which the ultimate judgment will have. The notice and effect provisions are interdependent and in addition vary with the kind of class action the court has determined the case to be.

Thus, in a (b) (3) action, the more discretionary form, the court "shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Rule 23 (c) (2). However, the judgment in such an action is effective only against those members of the class to whom the notice was provided (and who did not request exclusion). On the other hand, in a (b) (1) or (b) (2) action, there are no specific notice requirements and the judgment describes and binds "those whom the court finds to be members of the class." Section (d), however, empowers the court to determine the manner of notice.

Courts have frequently been concerned with the due process problems which may be presented by inadequate notice. See Eisen v. Carlisle and Jacquelin, 391 F.2d 555 (2d Cir. 1968). However, in a non-monetary civil liberties suit to establish or enforce constitutional rights, notice is less of a problem and courts have dispensed with the requirement of actual notice by reasoning that the attendant publicity of the lawsuit provides adequate notice to the members of the plaintiff's class. See, e.g., Denny v. Health and Social Services Board, 285 F.Supp. 526 (E. D. Wisc. 1968); Snyder v. Board of Trustees, supra. As to the presumably smaller defendant class in a bilateral action, actual notice can be provided. See, e.g., Wilson v. Kelley, supra.

The above discussion has attempted to outline the key features governing the institution of a class action. Of course, where specific problems arise the Rule and annotations should be consulted. A sample class action complaint in a hypothetical long-hair suit follows. A collection of citations to all known hair and dress cases is attached at the end of the complaint. Briefs on the merits are available in the National Legal Department.

SAMPLE COMPLAINT

UNITED STATES DISTRICT COURT

________ District of ________

__________ Division

JOHN DOE, JR., a Minor, by his Father and Next Friend, JOHN DOE: RICHARD ROE, JR., a Minor, by his Father and Next Friend, Richard Roe; JOSEPH JOE, JR., a Minor, by his Father and Next Friend, Joseph Joe, on their behalf and on behalf of all those similarly situated,

Plaintiffs,

vs.

THOMAS JONES, Individually and as State Commissioner of Public Education; WILLIAM BROWN, as Superintendent of District Number One Public Schools; and on behalf of all other District Superintendents similarly situated; JAMES SMITH, as Principal of Tom Paine High School, and on behalf of all other Principals similarly situated,

Defendents.

COMPLAINT

Jurisdiction

1. This is a civil action seeking declarative and injunctive relief to enjoin the deprivation, under color of state law, of plaintiffs' rights, privileges, and immunities under the United States Constitution. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sections 1343(3) and (4), 2201, and 2202; Title 42, U.S.C. Sections 1981, 1983, and 1975; and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution.

2. This action seeks a declaratory judgment invalidating as repugnant to the Constitution a directive promulgated by the defendant State Commissioner of Public Education authorizing District Superintendents, such as Defendant Brown, to adopt regulations governing the appearnace of high schools students within their respective Districts, and the regulations so adopted by Defendant Brown; and an unjunction to restrain the enforcement, operation and execution of such regulations by restraining Defendant Smith and other High School Principals from suspending or expelling the plaintiffs or others similarly situated for violation of said regulations on the grounds that such regulations are unconstitutional under the First and Fourth Amendments.

Parties

3. Plaintiff John Doe, Jr. is a citizen of the United States and of the State of __________. Until on or about ________, 1970 he was a student in good standing at Tom Paine High School. Following that date he was expelled from school. He resides at ____________________________.

4. Plaintiff Richard Roe, Jr. is a citizen of the United States and of the State of ____________. For the period from _________ to _________ he was suspended from attendance at Tom Paine High School and from all school activities. He is currently a student in good standing at Paine High School. He resides at _______________________.

5. Plaintiff Joseph Joe, Jr. is a citizen of the United States and of the State of ___________. He is currently a student in good standing at Tom Paine High School. He wishes to wear his hair fashionable long, so that it falls over his ears and the collar of his shirt. He has been deterred from doing so by the existence of the regulations propounded by District Superintendent Brown and their actual and threatened enforcement

by Defendant Smith. Plaintiff resides at ______________________.

6. Defendant Thomas Jones, upon information and belief a citizen of the United States and of the State of _______________, is State Commissioner of Public Education. As such he is authorized by Section 13 of the State Education Law to grant authority to District Superintendents to formulate rules of conduct for all high school students within their districts.

7. Defendant William Brown, on information and belief a citizen of the United States and of the State of ____________, is superintendent of District Number One Public Schools. As such, he is authorized to formulate regulations governing the appearance, conduct and discipline of all public school students within the district. He also has the power to review all expulsions and suspensions of high school students.

8. Defendant James Smith, on information and belief a citizen of the United States and of the State of _____________, is Principal of Tom Paine High School. As such, he is authorized to implement and execute the regulations promulgated by Defendant Brown governing students' appearance and conduct. In his official capacity, he was responsible for the expulsion of plaintiff Doe, the suspension of plaintiff Roe, and the threatened suspension of plaintiff Joe.

Class Action

9. Plaintiffs bring this action on their own behalf and on the behalf of other individuals similarly situated, because the class of students affected by the regulations on appearance promulgated by all ten District Superintendents and at issue herein is so numerous that joinder of all members is impracticable and questions of fact and law exist in common to the class. The constitutional claims of the plaintiffs are typical of the claims of the class, the relief sought against the named representative

defendants is typical of the relief sought against all superintendents and principals, and the named defendants can adequately protect the interests of their class. The representative parties will fairly and adequately protect the interest of all high school students subjected to the regulation. The prosecution of separate actions by individual students would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the defendant classes.

10. The named defendants as well as the classes they represent have acted on grounds generally applicable to the plaintiffs' class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class. There are questions of law and fact common to the members of both classes that predominate over questions affecting individual members and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Facts

11. On September 2, 1969 the defendant JONES, in his capacity as State Commissioner of Public Education and acting pursuant to the power conferred upon him by Section 13 of the State Education Law, promulgated the following directive:

> "Because of the frequent disturbances which were caused throughout the state during the 1968-69 academic year by the dress and appearance of certain students, the Superintendent of each School District within the State is hereby authorized to adopt regulations governing the appropriate manner of dress and appearance of all students within each District and the proper method of sanction against those students who violate such regulations."

12. Pursuant to this state-wide directive, on September 15, 1969 defendant BROWN issued the following regulation applicable to all male students within District Number One:

> "Boys' hair should be worn reasonably short and traditional in style. It should not hang over the eyes or over the ears. It should be tapered in the back. Sideburns should not be below the middle of the ears. Students shall not wear beards or mustaches.
>
> Any student who in the opinion of his principal has violated this rule shall be immediately suspended from attendance until the student satisfactorily complies with the rule. Any student who fails to comply for a period of more than two weeks shall automatically be expelled for the duration of the academic year."

13. This regulation both in its substantive definition and procedural aspects, is substantially similar to regulations adopted by each of the nine other District Superintendents in the class represented by defendant BROWN.

14. Defendant SMITH has enforced the District One regulation by expelling, suspending and threatening with suspension the male students in Tom Paine High School. His official actions in this regard reflect a pattern of enforcement by the high school principals similarly situated in District One and in the State.

15. On or about September 16, 1969 Plaintiff DOE, Jr. was informed by Defendant SMITH that the length of plaintiff DOE's hair was in excess of that allowed by the District One regulations in that it was not "traditional." When Plaintiff DOE refused to have his hair cut, he was immediately suspended by Defendant SMITH and told he could return to school when his hair was "acceptable" to Defendant SMITH. Plaintiff DOE refused to alter his hair style and on October 1, 1969 was expelled from Tom Paine High School in accordance with the two-week provision of the District One regulation.

16. Plaintiff DOE desires to return to Tom Paine High School. His continued expulsion jeopardizes the possibility of his matriculation at a college in the fall of 1970. He believes that he has a right to determine for himself the length at which he will wear his hair and that the length of a person's hair is not the proper determination of Defendants SMITH, BROWN or JONES.

17. On or about September 16, 1969 Plaintiff ROE, Jr. arrived at Tom Paine High School wearing a neatly-trimmed mustache. He was informed by Defendant SMITH that the mustache constituted a violation of the District One Regulation and ordered Plaintiff to go home and shave. Plaintiff left the school but when he did not return that day, Defendant SMITH caused his immediate suspension. ROE returned the next day with his mustache, his father and his attorney, and demanded a hearing to inquire whether his mustache constituted a clear and present danger to discipline in Tom Paine High School. Defendant SMITH stated that no such hearing would be allowed and that Plaintiff ROE's suspension would continue until he shaved his mustache.

18. On September 29, 1969, fearing the effect on his studies as well as on the Tom Paine High football team of which he was captain, Plaintiff ROE shaved his mustache and returned to school, thereby ending his suspension one day before the automatic expulsion rule would have gone into effect.

19. Despite his forced compliance with the regulation, Plaintiff ROE believes he has a right to determine for himself whether to wear a mustache and that such a decision should not be the responsibility of Defendants BROWN, or SMITH, or the classes they represent.

20. On or about October 1, 1969 Plaintiff JOE appeared at Tom Paine High School with his hair overlapping his shirt collar by approximately one inch. He was informed by Defendant SMITH that this was in

violation of the District One Regulation and ordered home to remedy the situation. Against his wishes, but fearful of being suspended, he proceeded to have his hair trimmed in conformity with the regulation and returned to school the following day, where his appearance was approved by Defendant SMITH.

21. JOE has remained a student in good standing throughout the academic year. However, he desires once again to let his hair grow in violation of the regulation, but has been deterred from doing so by the existence and threatened use of the regulation.

Cause of Action

22. The District One Regulation and similar regulations, as authorized by Defendant JONES, promulgated by Defendant BROWN and enforced by Defendant SMITH are unconstitutional on their face and as applied in that they violate the freedom of speech and self-expression guaranteed by the First and Fourteenth Amendments to the United States Constitution and Title 42 U.S.C. Section 1983.

23. The Regulation is unconstitutional on its face and as applied in that it is overbroad in violation of the First and Fourteenth Amendments to the United States Constitution.

24. The Regulation is unconstitutional on its face and as applied in that it violates the right of privacy contained in the Bill of Rights to the Constitution of the United States.

25. The Regulation is unconstitutional on its face and as applied in that it violates the rights guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution in that expulsion, suspension or threat thereof of the plaintiffs and the class they represent merely for exercising their personal tastes in grooming constitute cruel and unusual punishment.

26. The Regulation is unconstitutional on its face and as applied by violating the substantive due process rights of plaintiffs guaranteed by the Fourteenth Amendment in that the Regulation is arbitrary, capricious, unreasonable and not reasonably related to any substantive evil which the State has the right to prevent and not reasonably related to the valid governmental function of administration of the educational system.

27. The Regulation is unconstitutional on its face and as applied in that it violates the right to fair proceedings guaranteed by the due process clause of the Fourteenth Amendment. More particularly, it provides no method for an adversary hearing with the assistance of counsel before an impartial adjudicator whereby it can be determined inter alia whether the student's appearance poses a substantial threat to any interest which the school administration can legitimately advance or whether the student has a compelling reason for his appearance.

28. The plaintiffs and the class they represent will suffer irreparable harm if they are or continue to be expelled, suspended or threatened with expulsion or suspension. Those suspended or expelled are suffering irreparable injury in missing their normal school activities and having their records marred by disciplinary action.

29. Those students who have been threatened with discipline or who have complied under protest are being caused psychological harm and anguish.

30. The plaintiffs and the class they represent have no other adequate or effective remedy at law for the harm or injury done or threatened by Defendants BROWN and SMITH and the classes they represent. Such irreparable injury will continue unless declaratory and injunctive relief are afforded.

WHEREFORE, Plaintiffs pray for an order:

(1) directing that this action proceed as a proper class action on both sides;

(2) declaring that the state-wide directive and implementing Regulation are unconstitutional;

(3) enjoining the defendants and the classes they represent from disciplining any student for violation of such Regulations;

(4) ordering the reinstatement of all students presently expelled or suspended for violation of such Regulations, with reasonable provisions to allow them to make up work;

(5) expunging the disciplinary records of all such students;

(6) pending a hearing in this matter, a Temporary Restraining Order be issued enjoining and restraining the Defendants and their classes from enforcing or threatening to enforce any such regulations governing appearance.

HAIR CASES

(Through January 27, 1970 Issue of U.S. Law Week)

Favorable:

Breen v. Kahl, 296 F. Supp. 702 (W.D. Wisc. 1969), aff'd, ____F.2d _____ 38 U.S. Law Week 2332 (7th Cir. 12/3/69), pet. for cert filed, 38 U.S. LW. 3348.

Richards v. Thurston, 304 F. Supp. 449 (D.C. Mass. 1969). 1/

Zachry v. Brown, 299 F. Supp. 1360 (N.D. Ala. 1967).

Griffin v. Tatum, 300 F. Supp. 60 (M.D. Ala. 1969).

Westley v. Rossi, 38 U.S. Law Week 2257 (D.C. Minn. 1969).

Miller v. Barrington, Ill. Schools, unreported (D.C. Ill. 1969, Parsons, J.).

**Cordoya v. Chonko*, unreported (N.D. Ohio 1969).

**Slomovitz v. Miller, et al.*, unreported (N.D. Ohio 1969).

Meyers v. Arcata High School District, 75 Cal. Rptr. 68 (1969).

Lucia v. Duggan, 38 U.S. L.W. 2170 (D. Mass. 1969) (teacher with beard reinstated on due process grounds).

Finot v. Pasadena City Bd. of Ed., 58 Cal. Rptr. 520, 35 U.S. Law Week 2651 (1967) (teacher beard - due process).

Unfavorable:

Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), cert. denied, 393 U.S. 856.

Jackson v. Dorrier, _____F.2d _____ (6th Cir. April 6, 1970).

David v. Firment, 269 F. Supp. 524, Aff'd, 408 F.2d 1085 (5th Cir. 1969).

Crews v. Cloncs, 303 F. Supp. 1370 (S.D. Ind. 1969).

Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E. 2d 468 (1965).

Akin v. Bd. of Ed., 68 Cal. Rptr. 557, 36 U.S.L.W. 2773 (1968).

Brownlee v. Bradley County Bd., D. C. E. Tenn. 4/10/70 38 L.W. 2567.

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*Contact the Ohio affiliate for further information.

1/ affirmed, _____F.2d_____ (4/28/70), an excellent opinion which gathers together all the long-hair school cases. (A copy is included in this package.)

BLACKMON, ISENBERG & MOULDS
Attorneys at Law
901 "F" Street, Suite 200
Sacramento, California 95814
Telephone: (916) 444-8680

ABASCAL, KERRY & HABERFELD
Attorneys at Law
1212 "F" Street
Marysville, California 95901
Telephone: (916) 742-5191

RICHARD M. ROGERS
VISTA, Attorney at Law
1212 "F" Street
Marysville, California 95901
Telephone: (916) 742-5191

Attorneys for Plaintiffs.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MERLE KEITH JEFFERS, JR., a minor, by and through his Natural Guardian, MERLE KEITH JEFFERS; STEVEN P. SMITH, a minor, by and through his Natural Guardian, BERNARD P. SMITH; ALFRED GARY LOPEZ, a minor, by and through his Natural Guardian, RAYMOND LOPEZ, and on behalf of all others similarly situated,

Plaintiffs,

-vs-

YUBA CITY UNIFIED SCHOOL DISTRICT: CLARENCE SUMMY, Individually and as District Superintendent; JOHN HECKMAN, ALBERT POWELL, SAMUEL SHANNON, ROBERT BARTLETT, JAMES CHANGARIS, DELMONT EMERY, and LEO HOFFART, Individually and as Members of the BOARD OF TRUSTEES; GEORGE SOUZA, Principal of YUBA CITY HIGH SCHOOL; DON SOLI, Vice Principal of YUBA CITY HIGH SCHOOL,

Defendants.

NO. CIV. S-1555

SUPPLEMENTAL MEMORANDUM

OF POINTS & AUTHORITIES

INTRODUCTION

Plaintiffs' Counsel had anticipated that at some point in this case, prior to final summation, opposing Counsel would submit Points and Authorities covering the law on which Defendants relied. That expectation was not realized as opposing Counsel waited until his final summation before citing any case law, and his presentatio was then verbal, with no written Points and Authorities ever being submitted. As Plaintiffs' counsel were unfamiliar with several of his cited cases, two cases never having been reported, one of whic had been received in opposing Counsel's office on the morning of summation itself, it was somewhat difficult to adequately respond to these cases during Plaintiffs' closing summation. Accordingly, we find it desirable to submit a Supplemental Memorandum of Points and Authorities to discuss some of the cases raised by opposing Counsel in his summation and to incorporate these cases both into Plaintiffs' summation and into our original Memorandum of Points and Authorities. We trust that our Supplemental Memorandum will be helpful to the Court.

CASES FROM THE FIFTH CIRCUIT

We start with the Fifth Circuit where eight of the jointl cited cases were decided. The first decisions to come down, in 1966, were Burnside v. Byars, 363 F.2d 744 (1966), and Blackwell v. Issaquerra Cty. Board of Education, 363 F.2d 749 (1966), which announced the test to be applied in school cases where the First Amendment is involved. This test is whether the regulation is "reasonable". The Fifth Circuit Court of Appeals did not define "reasonable" to mean any rational basis, but defined a "reasonable" regulation to be one essential in maintaining order and discipline on the school property. The opinions state that the regulation must measureably contribute to the maintenance of order and decorum. Burnside and Blackwell can be compared for examples of the application of this test. In one case the test was met, in the other it was not.

In 1967, the Fifth Circuit Appellate Court affirmed Davis v. Firment, 269 F.Supp. 824 (E.D.La.--1967) Aff'd per curiam, 408 F.2d 1088, in a per curiam decision. Davis held that the right of free choice in grooming was not fundamental; that a symbol must represent a particular idea, and that long hair is equivalent to conduct, like marching or picketing. We submit that equating long hair with clear acts of conduct, like marching or picketing, is an inaccurate characterization. If the wearing of black arm bands is akin to pure speech, see Tinker v. Des Moines Independent School District, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), then we would argue that the wearing of one's hair long, is also very closely connected to free speech, in that this is a non-verbal expression of rejection of the beliefs and views of an older generation which has set unacceptable standards, involving constitutional rights, for young adults.

Ferrell v. Dallas Independent School District, 392 F.2d 697 (5th Cir. 1968), on which Defendants strongly rely, involved members of a musical group who asserted that they had an economic interest in wearing long hair. The facts give the strong impression that the long hair was worn as a publicity gimic; radio and television news coverage was even brought to the school by the musicial groups' agent; and after suspension, the group made and released a recording concerning their experience with the high school and the hair issue. The Court assumed for the purpose of the decision that students have a fundamental right to wear long hair. This assumption is directly contrary to the holding in Davis that no fundamental right was involved in the wearing of long hair. The Court found substantial disruption in Ferrell which materially interfered with the state's interest in providing the best education possible. Thus, it is clear that the Court had returned in Ferrell, to the Burnside and Blackwell test. A reasonable regulation is one that is essential in maintaining order and discipline on school property.

After Ferrell, the U. S. Supreme Court decided Tinker on February 24, 1969. The Court enumerated several significant principles applicable to student rights and to authority exercised by Boards of Education. The Court stated that students do not shed their constitutional rights to freedom of expression at the schoolhouse gate, and further:

> "That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount

> important principles of our government as mere platitudes." 21 L.Ed.2d 733, 738.

Though the Court recognized that "the problem posed by the present case [Tinker] does not relate to...hair style", citing Ferrell, the broad language of Tinker in defense of student rights while restricting the powers of Boards of Education, clearly is applicable to hair cases as well.

> "The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among these activities is personal intercommuncation among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Viet Nam, if he does so without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. Burnside v. Byars. But conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not recognized by the constitutional guarantee of freedom of speech." cf. Blackwell.

Clearly in Tinker tne Court adopted the "material and substantial disruption" test announced by the Fifth Circuit in Burnside and Blackwell, and which was applied to the circumstances of Ferrell.

In three of four other hair cases in the Fifth Circuit, the District Court Judges have recognized the applicability of Tinker and Ferrell and applied the material and substantial disruption test. Zachry v. Brown, 299 F.Supp. 1360 (N.D.Ala.--1969), decided prior to Tinker, found no disruption and held that the equal protection clause of the Fourteenth Amendment prohibits classification of students upon an unreasonable basis. The Court held that hair was an unreasonable basis on which to classify. Further, the Court held that the principle of Ferrell applied but that the cases were distinguishable on their facts.

Calbillo v. San Jacinto Jr. College, 305 F.Supp. 857, (S.E.Texas--1969), a post-Tinker beard case, held that the definition of reasonable relationship was that stated in Burnside and Blackwell, but the Court found no disruption. Calbillo held that the regulation constituted a denial of equal protection, following the Zachry rationale.

Griffin v. Tatum, 300 F.Supp. 60 (M.D.Ala.--1969), held that a student's right to wear long hair is a protected fundamental liberty and applied the material and substantial disruption test. Griffin dealt with many of the asserted and theoretical disruptions presented in our case but held that state interests were not sufficiently compelling to outweigh the fundamental student right to wear long hair. Opposing Counsel sought to distinguish this case by reference to the peculiar and arbitrary hair rule involved without reaching the primary purpose for which the case was cited, namely, that it too reaffirmed the material and substantial disruption test.

Stevenson v. Wheeler City Board of Education, 306 F.Supp. 97 (S.D.Ga.--1969), was a "clean shaven" mustache and facial hair case where the Court held, contrary to Ferrell, Griffin, Zachry, and Calbillo, that students had no fundamental right to choose thei own style of grooming. Thus, Stevenson is the only case in the Fifth Circuit to follow Davis. It is extremely important to note that Stevenson was set in the climate of a Georgia school engaged in the delicate task of integration, concerned with racial and ethnic overtones, the last vestiges of slavery and dehumanization, and the case must be read with those factors in mind.

In summary, we submit that the great weight of authority in the Fifth Circuit establishes that:

1) To be "reasonable" a regulation must be essential in maintaining order and discipline on school property. Blackwell, Burnside, Calbillo, Griffin, Zachry.

2) To be "essential" means the regulation is required to, in fact, prevent material and substantial disruption. Ferrell, Blackwell, Burnside, Calbillo, Griffin, Zachry.

3) The right to wear long hair is a fundamental right. Ferrell, Zachry, Calbillo, Griffin.

4) Where there is material and substantial disruption, the fundamental liberty is outweighed by the state's interest in order and discipline in the schools. Blackwell, Ferrell.

5) Where there is no showing of material and substantial disruption, the regulation is not reasonably related to the educational process. Zachry, Calbillo, Griffin,

Ferrell, *Burnside*.

OTHER COURT OF APPEALS DECISIONS

There are two other Court of Appeals decisions in hair cases, *Breen v. Kahl*, 419 F.2d 1034, (7th Cir.--1969) Cert. granted 38 LW 3348, Dokt. #1274, and *Jackson v. Dorrier* (6th Cir.--April 6, 1970) ____ F.2d ___. The facts in *Jackson* are very similar to the facts in *Ferrell*. The Plaintiffs again were members of a musical group; a commercial interest, not a freedom of expression interest, was being asserted.

> "Neither of the students testified that his hair style was intended as an expression of any idea or point of view. We agree with the findings of the District Court that this record does not disclose that the conduct of Jackson and Barnes and the length of their hair were designed as an expression within the concept of free speech. Therefore *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), has no application."

Further, in *Jackson*, by contrast to *Breen*, there was testimony that long hair was intended to foster a purely commercial interest. The Court found that there was no constitutional right infringed by the regulation or its enforcement. *Ferrell*, in contrast, assumed for the purposes of the opinion that the First Amendment was applicable and specifically found that the growing of hair for commercial purposes was protected by the liberty and property concepts of the Fifth and Fourteenth Amendments. *Jackson* did not discuss the Fifth and Fourteenth Amendments.

Thus, a comparison of *Jackson* with *Ferrell* demonstrates that while Jackson claims to follow Ferrell, the Sixth Circuit Court did not understand Ferrell and its reasoning. Jackson is much closer to Davis which was implicitly rejected in Ferrell. By concluding, in Jackson, that no constitutional rights were involved, the Court was able to hold that the Board of Education had the power to make and enforce the regulation without discussion of the materiality and substantiality of the disruption and disturbance, and without discussion of less subversive alternatives available to the school for control of the disruption and disturbance due to long hair.

Breen, on the other hand, while dealing with a regulation identical to that in the instant case, found no evidence of disruption or disturbance due to long hair. The Court held that a person's right to wear his hair as he likes is an ingredient of personal freedom protected by the U. S. Constitution, and, therefore, the State bears a substantial burden of justification when it seeks to infringe that right. In the absence of evidence of substantial disruption, this burden is not sustained. Breen is consistent with Burnside, Blackwell, Tinker, Ferrell, Zachry, Calbillo, and Griffin. Because the Court found that students have a protected constitutional right to wear long hair, it is inconsistent with Davis, Stevenson, and Jackson.

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OTHER DISTRICT COURT DECISIONS

Crews v. Cloncs, 303 F.Supp. 1370, (S.D.Ind.--1969), is a

District Court decision out of the Seventh Circuit which came to a conclusion contrary to Breen v. Kahl, 419 F.2d 1034 (7th Cir.--1969 Cert. granted, 38 LW 3348, Dokt. #1274, but on a factual distinction and not because it rejected the majority test of material and substantial disruption. The Court specifically found that Plaintiffs did materially and substantially interfere with the requirements of appropriate discipline in the school. As no examples of disruption were given, however, we have only the conclusary statement that disruption and discipline problems existed. Since it hel that the school authorities had met their burden of justification by showing actual classroom disruption of a material and substantia nature, Crews is consistent with the majority view and lends no support to Defendants' position that all they need to show is a reasonable relationship to the educational process.

Brick v. Board of Education, School District No. 1, Denver, Colorado, 305 F.Supp. 1316, (D.Colo.--1969), is another case on which Defendants rely. The facts in that case are significantly different from those in the instant case. In Brick the students played a significant role in the adoption and review of dress codes, and an overwhelming majority of students wished to maintain the hair regulations, and not change them. Also, as opposed to the instant case, there was substantial evidence of disruption and distraction in Brick. In our case, no such evidence was introduced.

The Court held in Brick that such symbolic expressions of individuality as hair are not within the First Amendment but are protected by the due process clause of the Fourteenth Amendment.

While the language in Brick appears to rely on the minority view announced in Davis, the analytical framework is consistent with the majority view. The Court specificially found that there was evidence of material and substantial disruption. If the Brick Court had before it the facts of the instant case, where the students were not allowed to play any role in the adoption and review of male hair regulations, where an overwhelming majority of students wished to abolish male hair regulations, and where the disruptive incidents, if in fact there were any, were as insubstantial as those brought out in our case, the Court clearly would have held to the contrary.

There are two District Court decisions out of the Eighth Circuit, Sims v. Colfax Community School District, 307 F.Supp. 485, (S.D.Iowa--January 16, 1970), and Westley v. Rossi, 305 F.Supp. 706, (D.Minn.--1969). In Westley the Court applied the material and substantial disruption test to each of the many arguments presented similarly in the instant case. The Court found that no health hazard was involved as long as hair was kept clean and that protective devices could be worn where long hair presented a possible safety hazard. Answering the argument that discipline and disruption problems might occur, the Court cited Tinker for the principle that undifferentiated fear is not sufficient to overcome the right to free expression. The Board of Education contended that it was concerned with the personal safety of the Plaintiff; the Court answered that acts of hostility should be prevented, not expressions of individuality, and that it was Plaintiff's choice whether to expose himself to harassment, not the schools' business. The Court held the regulation to be an invasion of private life beyond the jurisdiction of the school.

Speaking to the reasonable relationship argument, the Court said, clearly relying on the Burnside and Blackwell definition of "reasonable":

> "Regulation of conduct must bear a reasonable basis to ordinary conduct of the school curriculum or to carrying out the responsibility of the school. No moral or social ill consequences will result to other students due to the presence or absence of long hair nor should it have any bearing on the wearer or other students to learn or to be taught."

Westley is definitely in line with the majority on the hair issue.

While opposing Counsel sought to distinguish Sims v. Colfax on the ground that it involved a girl protesting hair regulations, the decision is still significant in that it holds that only those school rules that are reasonable are permissable, defining "reasonable" in the same manner as Tinker, Burnside, and Blackwell. In a lengthy analysis the Court indicated the differences in the various approaches to the hair problem, and the Court took the position that the school authorities must show a compelling reason to infringe upon this important constitutional right, namely, material and substantial interference with the educational process.

The regulation enjoys no presumption of constitutionality and the test applied by the Court was strictly objective: the school authorities have the burden to show that the rule actually prevents disruption. Mere conclusions that long hair may be disruptive is not the test of reasonableness. Any rule could be justified on such a standard.

Richards v. Thurston*, 304 F.Supp. 449 (1969), (D.Mass--1969), is a hair decision by Judge Wyzanski. In this case there was no formal rule and no evidence of disciplinary problems. The Court found that the reason behind the suspension was the arbitrary prejudice of the principal; the Court held that personal prejudice was not such a rational ground for dictating hair style as to support an official order interfering with the student's liberty to express himself in his own way in his search for identity. The Court found that an individual's choice of hair style is protected by the Fourteenth Amendment Due Process Clause. In a Supplemental Opinion Judge Wyzanski stressed that no rational basis for the suspension was alleged.

In a Second Supplemental Opinion Judge Wyzanski, discussed Crews v. Clones, observing that the Plaintiff was there barred principally because his hair caused others to be disorderly. Judge Wyzanski took the position that a man may not be restrained from doing a lawful act merely because he knows that his doing it may cause another to do an unlawful act. In a Third Supplemental Opinion Judge Wyzanski stressed that the wearing of long hair is part of freedom of expression or an aspect of ordered liberty.

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* See Appeals Court opinion, infra. p. 106

It is clear that Judge Wyzanski's position is consistent with the majority in regard to the substantial and material disruption test and the reasonable relationship test. It is also consistent with the majority in finding a protected constitutional right, either under the First Amendment or through the Fourteenth Amendment Due Process Clause. Further, Judge Wyzanski recognized that long hair does not cause disruption by itself, and therefore, disruptive acts should be prohibited, not long hair. This view is supported by Burnside, Blackwell, Tinker, and Terminiello v. Chicago, 377 U.S. 1, 69 S.Ct. 894.

In the Ninth Circuit there have been three hair cases, Olff v. Eastside Union High School District, 305 F.Supp. 557, (N.D.Cal.--1969), Neuhaus v. Torrey, (9th Cir. March 10, 1970), and Contreras v. Merced High School District, (U.S.D.C.--E.D.Cal.--1968), No. F-245-Civ. In Olff, Judge Peckham was dealing with a rule substantially like the one in the instant case. He found the rule to be overbroad under the First Amendment in that particular circumstances where long hair might be a health or safety problem were not specified. He relied on Richards for the principle that merely arbitrary choices cannot be enforced against an individual's serious claims of liberty, and the State must make a strong showing of need in order to curtail a constitutional right. He held that the regulation inhibited free expression more extensively than is necessary to achieve legitimate governmental purposes.

Olff is clearly in line with the majority view as to the proper test to be applied to school regulations when free expression is involved.

Neuhaus v. Torrey, another case on which Defendants rely heavily, involved a factual situation *radically different* from that in the instant case. There, the hair regulation applied only to members of the school athletic teams, not to the entire student body, and Judge Harris found that long hair could adversely affect athletic performance. He also found that in the athletic setting there was no constitutional right to wear long hair, and he stressed that he was dealing with the delicate relationship between athlete and coach, a relationship uniquely characterized by discipline and morale factors. If the athlete chose to wear long hair, the consequence was "merely to forego any athletic competition", not to forego a public education. He held that there was no impairment of constitutional prerogatives to require Plaintiffs to bring themselves within the spirit, purpose and intendments of the rule.

While Judge Harris applied a rational relationship test, he was concerned solely with the athletic setting, and it is clear that he did not intend application of his analysis to a hair regulation applicable to all male students, regardless of participation in formal athletic competition.

In *Contreras*, a pre-*Tinker* decision, the Court found that the Plaintiffs had excessive absences to the point of being habitual truants; that their hair was not neat, well kept, or decorous; that the regulation was reasonable and rational, and that long hair was likely to result in disruption and disturbances. The Court indicated, in a closing remark, that *anything* that interferes with the right of the majority and the operation of the school district in the educational system has to give way. The Court did not find that a constitutional right was involved, and, in light of *Tinker*, the Court's analytical framework was, we submit, overbroad. *Contreras* is consistent only with those few cases which found that the wearing of long hair was not protected by the First Amendment nor any other amendment to the U. S. Constitution, namely, *Davis*, *Stevenson*, and *Jackson*. We have already distinguished those cases.

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STATE CASES

Two State cases remain to be considered, *Leonard v. School Committee*, 349 Mass. 704, 212 N.E.2d 468 (1965), and *Akin v. Board of Education of Riverside Unified School District*, 68 Cal. Rptr. 557 (1968). In *Leonard*, the Massachusetts Supreme Court had before it a vague regulation and the Court dealt solely with State law, except for holding that the Fourteenth Amendment Due Process requirements were met by the principal's verbal directive to the student and a hearing before the Board of Education. First Amendment arguments were not discussed, and the Court applied a simple rational basis test. Note also, that *Leonard* was a pre-*Tinker* case. In *Leonard*, Plaintiff was a professional musician and the Court held that an economic interest in hair was not sufficient to raise constitutional claims. This holding is contrary to the holding in Ferrell that an economic interest does raise constitutional claims under the Fifth Amendment. It is interesting to note that the regulation in question would be void in vagueness in California. See Meyers v. Arcata Union High School District, 75 Cal.Rptr. 68 (1969).

Akin is an abberrational beard case, where the Court found no disruption or distraction by the Plaintiff, but that his beard did constitute a disruptive influence in that it lead to teasing by other students and that other students wanted to follow his beard growing example. The Court held that the power of the State to control the conduct of children reaches beyond the scope of its authority over adults, but it relied on Ginsberg v. New York, 390 U.S. 629 (1968). This rationale was laid to rest in Tinker, and no other Court has adopted the rationale of Akin. Compare Akin with Finot v. Pasadena City Board of Education, 58 Cal.Rptr. 520 (1967).

THE FACTS OF THE INSTANT CASE

In reaching a decision in this case we would stress several unique facts that have been introduced into evidence. First, an overwhelming majority (70-83%) of the student body at Yuba City High School have indicated that they wish to abolish male hair regulations. The Student Body Government passed a resolution to abolish male hair regulations. The resolution was vetoed by the Principal. Only three disruptive incidents occurred at the High School over the past several years. One of the three incidents took place in a Special Education Class for the mentally retarded; another involved "distraction" of a music class by a long haired visitor in 1968, when long hair styles were still relatively new. The third incident allegedly involved a fight in the hall, which the teacher who testified did not actually see but he believes came about as a result of teasing and long hair. These three incidents were well within the control of the faculty, and it can hardly be argued that they rise to the level of material and substantial disruption, nor indeed, that they in any way match the level of disruption occasioned by evidence of school sanctioned activities, donkeys and goats paraded through the classroom; beard growing contests for students and faculty; and crazy dress week where admittedly, little in the way of formal instruction is accomplished.

Defendants argue that a reasonable basis test should be applied, but they fail to recognize that the overwhelming weight of authority defines "reasonable" in this context as those regulations which are essential in maintaining order and discipline on school property. It approaches absurdity to argue that a hair regulation is "essential" in a school where the students have voted overwhelmingly to abolish that regulation. Indeed, the Plaintiffs testified that they have been allowing their hair to grow long since last summer, a period of at least seven months, and they have not been involved in nor observed any incidents of disruption or disturbance involving long hair. They have further testified and their records bear witness to the fact that the long haired Plaintiffs, are well above average students who attend school regularly and have no disciplinary blemishes on their records, aside from the suspensions occasioned by their refusal to cut their hair in accordance with the school regulation.

Defendants assert that upon any rational basis they have the power to deny Plaintiffs and others similarly situated a public education until and unless they cut their hair. At bottom, they assert that the compelling state interest test (in the school setting, denominated the "material and substantial disruption" test) which is applicable whenever a governmental body attempts to infringe an individual's constitutional rights, is inapplicable in the school setting. Defendants refuse even to consider less onerous alternatives. Such a position is constitutionally invalid. Sherbert v. Verner, 374 U.S. 398 (1963), and Shelton v. Tucker, 364 U.S. 479 (1960).

Long hair at Yuba City High School is not the novelty it once was. The fears of the Defendants that long hair will lead to disruption and distraction is an undifferentiated fear not based on reality. There are presently many people in the Yuba City area who wear their hair in a style which would be in violation of the regulation at Yuba City High School; there are many long haired students at the Yuba College and at a sister high school, Marysville

Union High School; there are shows on television which feature long haired male actors; there are news reels, movies, and magazines featuring long haired participants; and finally, that between 70 and 83.7% of the students at Yuba City High School support abolition of male hair regulations, we submit, is conclusive evidence that styles are changing, even in the Yuba City area.

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CONCLUSION

We submit that while there is a split in authority, the better reasoned cases and the overwhelming weight of authorities support the position of Plaintiffs in this case. We clearly are here dealing with a First Amendment Freedom of Expression Right, where young adults are expressing their personal identities and passively, unobtrusively and non-verbally are asserting their opposition to the standards of another generation. And, the circumstances at Yuba City High School, including uncontroverted testimony of several teachers of no disruption from the wearing of long hair and no tension or devisiveness stemming from the wearing of long hair, plus the overwhelming voice of the young adults themselves, demonstrates that there is no reasonable basis on which to impose a male hair regulation. Clearly, there is no evidence of material or substantial disruption. What we do have here, is an intransigent generation applying one standard to measure disruption when dealing with activities proposed or sanctioned by the administration, and another standard when dealing with student initiated change. Neither reason, logic nor basic fairness permit this type of arbitrary imposition of restrictive regulations where First Amendment Freedom of Expression Rights are involved. Further, in defense of their constitutional rights, the students have explored every avenue open to them in their attempt to maturely and responsibly bring about change in a regulation which directly affects them alone -- twenty-four hours a day! They now come to this Court for redress of grievances, having been denied relief at every other step along their path by intransigent, unyielding and inflexible administration. There is no other avenue of redress existant for these young adults: They have significant grievances but they are caught in the web of an unresponsive and unyielding system. There can be no question but that judgment must be for Plaintiffs.

DATED: April 23, 1970.

RESPECTFULLY SUBMITTED,

BLACKMON, ISENBERG & MOULDS
ABASCAL, KERRY & HABERFELD
RICHARD M. ROGERS

BY: ____________________
Attorneys for Plaintiffs.

DONALD H. GLASRUD
Attorney at Law
4780 North Safford Avenue
Fresno, California
Telephone: 225-6320

DONALD C. THUESEN
Attorney at Law
8th Floor, 1060 Fulton
Security Bank Building
Fresno, California
Telephone: 268-6145

Attorneys for Amicus Curiae

IN THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MADERA

DANIEL MONTALVO, a minor through his father and guardian ad litem, RICHARD MONTALVO,

Plaintiff,

vs.

MADERA UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, et al,

Defendants.

No. 16586

AMICUS CURIAE

NOTE: This is an excerpt from an amicus brief filed by the American Civil Liberties Union of Northen California. The Montalvo plaintiffs lost in the trial court, but the case is now being appealed.

INTRODUCTION

Under challenge in the instant case is a regulation governing student hair length and style adopted by the Board of Education of the Madera Unified School District. This regulation provides as follows:

> Hair must be clean and well groomed. Boys must keep their hair neat and trimmed above the eyes, ears, and collars. Hair must be tapered up from the neck.

Because the court has expressed its desire that *amicus* refrain from taking a protagonist's position, this *amicus* brief is limited to a discussion of the constitutional issues which arise from attempted regulation of hair styles by public school authorities. This brief sets forth the constitutional standards which the American Civil Liberties Union of Northern California believes must be applied in all cases involving public school regulation of hair fashion; no attempt is made to argue how these standards should be applied under the facts of the instant case.

I

STUDENT HAIR FASHION IS A FORM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Expression by School Children is Entitled to First Amendment Protection

It cannot be denied that California school officials have the authority to mulgate rules and regulations governing the operation of the schools in general and student conduct in particular. The Constitution of the State of California places upon the state legislature the duty and the power to maintain a system of free public education in the state. Cal. Const. art. IX, §1,5. The legislature has, in turn, delegated authority to local school districts to operate public schools (Educ. Code §921) and to promulgate rules and regulations governing student conduct and behavior. Educ. Code §10604. These regulations may be enforced by suspension or expulsion of students who refuse or neglect to obey them. Educ. Code §§10604, 10609; and see generally, Meyers v. Arcata Union School District, 269 A.C.A. 633, 640-641; Akin v. Riverside Unified School District Board of Education, 262 Cal. App. 2d 161, 167.

However, as with all rules, regulations, and statutes passed or promulgated by governmental bodies in our nation , school rules and regulations must pass constitutional muster. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S. Ct. 733 (1969); West Virginia State Board v. Barnette, 319 U.S. 624 (1943). Where public school regulations governing dress and grooming clash with constitutionally protected rights of students, the regulations must yield. Meyers v. Arcata Union School District, supra; Breen v. Kahl, 296 F. Supp. 702.

It is now firmly settled that minors are entitled to many of the protections afforded by the United States Constitution. In re Gault 387 U.S. 1. The rights afforded by the First and Fourteenth Amendments have long been recognized to extend to children as well as adults. Indeed, the United States Supreme Court declared as long ago as 1943 that the First Amendment rights of minors must be protected from encroachment by school authorities. "The Fourteenth Amendment, as now applied to the States protects the citizen against the State itself and all of its creatures--Boards of Education not excepted." West Virginia State Board v.

Barnette, supra at 637. In that case the United States Supreme Court held unconstitutional the expulsion from school of students for thier failure to salute the flag of the United States. And the Court, per Mr. Justice Jackson, said:

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or for citizens to confess by word or act their faith therein." Id., at 642.

The United States Supreme Court, in its last term, must surely have silenced all possible debate as to the availability of the First Amendment right of freedom of speech or expression in the public schools. In Tinker v. Des Moines Independent Community School District, supra, its most significant decision in the area of juvenile rights since In re Gault, supra, the Court said at 506:

> "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

See also, Burnside v. Byars, 363 F.2d 749 (5 Cir. 1966); L. A. Teacher's Union v. Los Angeles City Board of Education, 71 A.C.A. 572, 579; Mandel v. Municipal Court, 276 A.C.A. 788, 805.

The United States Supreme Court held in Tinker that the wearing by school children of black arm bands protesting the Vietnam war constituted symbolic speech. The court affirmed that this exercise of expression by public school students was entitled to the protections afforded by the First Amendment.

Amicus believes that the settled entitlement of public school students to First Amendment liberties, as affirmed by Tinker, must control the determination of the instant case.

B. Hair Fashion is a Form of Expression Protected by the First Amendment

Almost as equally well settled, is the proposition that an individual's right to groom himself as he pleases is a liberty guaranteed by the Fourteenth Amendment to the United States Constitution. This right was recognized in the last century in Ho Ah Kow v. Nunan, 12 Fed. Cas. 252 (No. 6, 546) (C.C.D. California 1879). In that case the sheriff of San Francisco cut off the queue of a Chinese inmate of the county jail. The court, per Field sitting as Circuit Justice, found the sheriff's action to be "cruel and unusual punishment," saying:

> "The cutting off the hair of every male person within an inch of his scalp, on his arrival at jail, was not intended and cannot be maintained as a measure of discipline, and can only be a measure of health in exceptional cases." Id., at 254.

In his note on the Ho Ah Kow case in 18 Am. Law Reg. 685, Judge Cooley made the following observations:

> "There is and can be no authority in the state to punish as criminal such practices or fashions as are indifferent in themselves, and the observance of which does not prejudice the community or interfere with the proper liberty of any of its members. No better illustration of one's rightful liberty in this regard can be given than the fashion of wearing the hair. If the wearing of a queue can be made unlawful, so may be the wearing of curls by a lady or of a mustache by a beau, and the state may, at its discretion, fix a standard of hair-dressing to which all shall conform. The conclusive answer to any such legislation is, that it meddles with what is no concern of the state, and therefore invades private right. The state might, with even more color of reason, regulate the tables of its citizens than their methods of wearing their hair; for the first might do something towards establishing temperance in eating, while the other would be simply absurd and ridiculous." [Quoted in footnote to Ha Ah Kow v. Nunan, supra, 254-255.]

Ho Ah Kow is supported by subsequent dictum in opinions of the United States Supreme Court. In Kent v. Dulles, 357 U.S. 116 (1958), the United States Supreme Court, in dealing with the right of a citizen to leave the country, observed:

> "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." Id., at 126 (emphasis added)

At the same page the Court also quotes the following from Chafee, Three Human Rights in the Constitution of 1787, 197 (1956):

> "Our nation has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases." (emphasis added)

The California courts have announced that the right of an individual to freely choose his hair fashion is protected by the constitutional guarantee of freedom of expression.

The right of an adult to wear a beard is protected by the First Amendment. Finot v. Pasadena City Board of Education, 250 Cal. App. 2d 189, 198 (1967), after citing the above quoted language in Kent v. Dulles, supra, and noting that "A beard was part of what appellant wore and it obviously was close to his heart," held that the wearing of a beard is a fundamental liberty guaranteed by the United States Constitution against state infringment. There the court ordered the reinstatement of a public school teacher who had been removed from his regular teaching duties because of his beard. The court said:

> "It seems to us that the wearing of a beard is a form of expression of an individual's personality and that such a right of expression, although probably not within the literal scope of the First Amendment itself, is as much entitled to its peripheral protection as the personal rights established by Pierce and Meyer with respect to the right of parents to educate their children as they see fit. It will be noted that these last mentioned rights likewise relate largely to nonverbal conduct rather than to speech itself, but so does, to a significant degree, the consitiutional right of political activity established in California by Fort, supra, and so does, for example, picketing (Thornhill v. Alabama, 310 U.S. 88 [84 L. Ed. 1093, 60 S.Ct. 736]), and the carrying of a red flag (Stromberg v. California, 283 U.S. 359 [75 L. Ed. 1117, 51 S.Ct. 532, 73 A.L.R. 1484])." Id. at 199.

California appellate courts have also held that the wearing of a chosen hair style by a juvenile is similarly entitled to First Amendment protection. The first California case to recognize this right was Akin v. Board of Education of Riverside Unified School District, 262 Cal. App. 2d 161. Although Akin upheld the validity of a school regulation against wearing beards, the court nevertheless recognized that the wearing of a beard is a constitutionally protected right of a juvenile. Akin v. Board of Education, supra, at 166-167.

In Meyers v. Arcata Union High School District, supra, where the court struck down a student hair length regulation for unconstitutional vagueness, it was said:

> "The wearing of a beard by one engaged in the educational process is an expression of his personality and, wearing it, he is entitled to the protection of the First Amendment of the Constitution of the United States (Citations omitted). Because a long hair style is indistinguishable from a beard for constitutional purposes, a male affecting it in a school is entitled to the same protection. Adulthood is not a prerequisite: the state and its educational agencies must heed the constitutional rights of all persons, including school boys (citations omitted)." Id., at 641-642.

The argument that student hair style is a form of "expression" protected by the First Amendment has been raised in recent decisions of at least seven U.S. District Courts. Five of these decisions found it unnecessary to decide the issue, chosing instead to invalidate hair length regulations on the ground that they invaded a constitutionally protected right of privacy.[1] Griffin v. Tatum, 300 F. Supp. 60, 62 (M.D. Ala. 1969)[2]; Breen v. Kahl, 296 F. Supp. 702, 705-706 (W.D. Wisc. 1969); Richards v. Thurston, Civil No. 69-993-W, D.C.Mass., September 23, 1969; Olff v. East Side Union High School District, Civil No. 52282 N.D. Calif., October 1, 1969; Westley v. Rossi, summarized in 38 U.S. Law Week, 1066, D.C.Minn., October 8, 1969.[3]

However, serious discussion is given in several of these cases to the proposition that hair style constitutes expression. In Breen v. Kahl, supra, it is said at 705:

> "Whether wearing one's hair at a certain length or wearing a beard is a form of constitutionally protected expression is not a simple question. Unquestionably, it is an expression of individuality, and it may be . . . that the manner in which many younger people wear their hair is an expression of a cultural revolt."

In his very recent opinion in Olff v. East Side Union High School District, supra, Judge Peckham, observes:

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[1] For our argument that hair style is also constitutionally protected by the right of privacy recognized in Griswold v. Connecticut, 381 U.S. 479, see Part III, infra, this brief.

[2] This case also holds the particular regulation involved to violate the equal protection clause of the Fourteenth Amendment. 300 F. Supp. 60, 62.

[3] At the time of writing only the U.S. Law Week summary of this decision is available to amicus. However, if the summary is accurate, this decision follows the reasoning of Richards v. Thurston, supra.

> ". . . This court holds the regulations to be unconstitutionally overbroad in that they inhibit free expression more extensively than is necessary to achieve legitimate governmental purposes."

Another recent U. S. District Court decision, Crews v. Cloncs, Civil No. IP 69-C-405, S.D. Ind., September 17, 1969, recognizes that hair style can be an expression of opinion constituting symbolic speech protected by the First Amendment; however, that case upholds the school regulation in question. See also, Ferrell v. Dallas Independent School District, 392 F. 2d 697, which seemingly recognizes hair style to be a matter of expression, but which nevertheless upholds the regulation attacked.

At least one U.S. District Court decision holds specifically to the contrary. In Davis v. Firment, 269 F. Supp. 524, 527 (E.D. La. 1967) the court specifically refused to recognize a high school student's haircut as symbolic expression saying:

> "A symbol is merely a vehicle by which a concept is transmitted from one person to another, unless it represents a particular idea, a 'symbol' becomes meaningless."

Amicus takes issue with this too restrictive definition of symbolism. Symbols do not convey a "particular" idea but instead are ambiguous signs whose referrents are elusive.

> "People seldom realize that a style of dress, of hair, and of every kind of external nonconformity represents a sort of language, albeit frequently vague and unintelligible. So far, no one has compiled a dictionary of these 'languages' nor researched their grammar and syntax. Nevertheless, they are forms of expression.. . . Languages themselves would have no significance if objects did not possess a speech of their own. World literature would be meaningless if the human spirit did not try to express itself in the most divergent possible ways." Singer, "The Extreme Jews", *Harper's Magazine*, 55, 56, April 1967.

Few would take issue with the proposition that a symphony score constitutes symbolic expression entitled to First Amendment protection. Yet, it is difficult to argue that the symbols which make up the symphony score represent particular "ideas" within the Davis v. Firment definition. The message conveyed by the affectation of long hair is no less elusive than that conveyed by a symphony.

To some wearers, long hair may be a specific protest toward restrictive and inhibitive school and societal restrictions. In many cases long hair worn by male students conveys nothing more than: "I am an individual;" "I am a nonconformist;" or, "I am a member of a particular sub-group of our society." Yet, it is submitted that this elusive message is sufficient to constitute symbolic expression protected by the First Amendment.

In Meyers v. Arcata Union High School District, supra:

> "A California court has observed that men wear beards as symbols (symbols of masculinity, authority and wisdom or of nonconformity and rebellion), and that it is the symbolic value which merits constitutional protection. (Citations omitted) The symbolic value of long hair on a male is probably less obvious: we do not readily accept it as symbolic of masculinity, for example, and in the modern secondary school it may bespeak conformity rather than otherwise. . . . Its symbolic value, however, need not be judicially assessed: The symbolism is subjective in the person wearing it. 'A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.' (Board of Education v. Barnette, 319 U.S. 632-633 . . .). If a growth of hair means anything to its wearer (including the right to wear it long), the First Amendment protects him in affecting it, and this is so whether he displays it on his chin or on his scalp." Id., at 641-42, footnote 6.

Amicus believes that long hair affected by male students is entitled to protection as a First Amendment liberty.

United States Court of Appeals
For the First Circuit

No. 7455.

ROBERT RICHARDS,
a Minor by his father and next friend
ROBERT RICHARDS, JR.,
PLAINTIFF, APPELLEE,

v.

ROGER THURSTON,
as Principal of Marlboro High School,
DEFENDANT, APPELLANT.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Appellee adopts the Statement of the Case in Appellant's brief except to note that the record does not affirmatively show whether or not the appellee was present in court on September 23, 1969, and whether his presence and appearance were acknowledge by the judge.

ISSUES PRESENTED FOR REVIEW

1. **Does a male student have a basic personal right protected by the Constitution, to wear his hair as he chooses without interference from any governmental authority, absent a clear and overriding justification for the interference.**

2. **Was the action of appellant, based upon personal predilections for hair styling and not upon any written regulation, a violation of the appellee's rights under the Equal Protection and Due Process clauses of the Fourteenth Amendment to the Constitution of the United States.**

ARGUMENT

I. The Court Below Was Correct In Holding That The Action Of The Defendant Was An Infringement Of The Plaintiff's Constitutionally Protected Fundamental Right Of Personal Liberty

The defendant suspended plaintiff from the Marlboro High School *solely* on the basis that the defendant thought the plaintiff's hair too long. (A. 6, Answer Par. 5) The defendant does not deny that, apart from his edict, the plaintiff is entitled to the status of a student at Marlboro High School. Contrary to the suggestion in the amicus curiae brief, it is clear that in Massachusetts students attend public schools as a matter of right, which is legally protected. Mass. G. L. Ch. 76, §16; *Leonard* v. *School Committee of Attleboro*, 349 Mass. 704. "Few rights are

of more importance to our youth than the right to attend our public schools." *Id.* at 707.[1]

The Court below held that plaintiff has a constitutionally protected right to "his liberty to express in his own way his preference as to whatever hair style comports with his personality and his search for his own identity" (A. 44). In so doing, the Court was by no means establishing a novel principle but rather was following the precedents set in three United States District Courts and subsequently followed in the Court of Appeals for the Seventh Circuit and in the U.S. District Court for the District of Minnesota. ***Breen*** v. ***Kahl***, 296 F.Supp. 702 (W.D. Wis. 1969); ***Griffin*** v. ***Tatum***, 300 F. Supp. 60 (N.D. Ala. 1969); ***Zachary*** v. ***Brown***, 299 F. Supp. 1360 (N.D. Ala. 1967); ***Westley*** v. ***Rossi***, 38 Law Week 2257 (U.S.D.C. Minn. 1969); ***Breen*** v. ***Kahl***, — F.2d — (7 Cir 1969, Nos. 17552, 17553). The Court below recognized that its decision was possibly in conflict with a decision of the Court of Appeals for the Fifth Circuit in which Chief Judge Tuttle dissented, ***Ferrell*** v. ***Dallas Independent School District***, 392 F.2d 697 (5th Cir. 1958), cert. denied 393 U.S. 856 and one Federal District Court, ***Crews*** v. ***Clones***, 303 F. Supp. 1370 (S.D. Ind. 1969). ***See also Davis*** v. ***Firment***, 269 F. Supp. 524 (E.D. La. 1967). ***Leonard*** v. ***School Committee of Attleboro***, *supra*, did not consider the constitutional issues here involved. It is the position of the Plaintiff that those cases denying reinstatement to expelled students are distinguishable from the present case and in any event fail to give sufficient recognition to the constitutional rights involved.[2]

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[1] In any event, even if a student does not have a "right" to attend public school, unconstitutional conditions could not be attached to the "privilege" of attending. E.g., *Pickering* v. *Board of Education*, 391 U.S. 563, 563 (1968). And see the cases in note 3, *infra*.

[2] In addition New York and other states have administratively recognized the constitutional right of a student to the liberty of determining

As Judge Johnson stated in *Griffin* v. *Tatum, supra* at 62:

> "Although there is disagreement over the proper analytical frame work, there can be little doubt that the Constitution protects the freedoms to determine one's own hair style and otherwise to govern one's personal appearance. Indeed, the exercise of these freedoms is highly important in preserving the vitality of our traditional concepts of personality and individuality."

The right to determine one's own hair style as an ingrelient of personal liberty is protected by the due process clause of the Fourteenth Amendment to the United States Constitution. The source of this protected liberty has been found in "penumbras" of the first amendment freedom of expression in the manner suggested in *Griswold* v. *Connecticut*, 331 U.S. 479 (1965), see e.g. *Breen* v. *Kahl, supra* 7th Cir. 1969), and as an aspect of the personal liberty ontained in the due process clause, e.g. *Breen* v. *Kahl*, 296 F. Supp. 702; *Griffin* v. *Tatum, supra; c.f., Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). See also the dissent of Douglas, J. in *Ferrell* v. *Dallas Indep. Sch. Dist., supra.*

An individual's mode of wearing his hair is one of the fundamental liberties protected by the Fourteenth Amendment. Few things are perceived by most people as more basic to the personality and ordinarily irrelevant to he concerns of the State than one's possessive physical appearance. Absent a showing of compelling need, to interpose the power and judgment of the State between the individual and his personal appearance is the grossest infringement upon the right of an individual to determine for himself his self image and the image which he wishes to project to others. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U.S. 516, 524 (1960). Here, there can be no doubt that a substantial and unjustified infringement of personal liberty has occurred. As suggested by the District Court in *Breen* v. *Kahl, supra*, 296 F. Supp. at 704, it is instructive to look at the rights here involved outside of the educational context. For a state to enact a statute or a city an ordinance stating that all males must have beards and all females short hair "would offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity and would invade human 'being'. It would violate a basis value "implicit in the concept of ordered liberty,' *Palko* v. *Conn.*, 302 U.S. 319, 325 (1937). It would deprive a man or woman of liberty without due process of law in violation of the Fourteenth Amendment."[3] *Breen* v. *Kahl, supra*, 296 F. Supp. at 706.

Moreover, to force a student to cut his hair amounts to a state required intrusion upon his bodily integrity, an interest to be entitled to constitutional protection. *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Schmerber* v. *California*, 384 U.S. 757 (1966).

Finally, the length and style of one's hair generally is more than just an expression of one's personality but is generally an expression of one's status in the com-

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he length of his hair. See, e.g., *In re Myers*, 9 N.Y. Ed. Dept. Rep. Dec. No. 8021 (1969), *In re McLagan*, 9 N.Y. Ed. Dept. Rep. Dec. No. 8027 (1969).

[3] It is clear that the plaintiff's status as a student or former student is of no constitutional relevance.

> "In our system state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the state must respect, just as they must respect their obligations to the state."

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). See also *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1942); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968).

munity, one's occupation, life style and one's hierarchy of values. Hair is often an expression of one's religion such as in the case of the Amish or of the Hasidic Jews and, in the context of current society, is often a non-verbal expression of one's racial or ethnic pride or one's political or philosophical views or attitudes. See, e.g., *Ho Ah Kow* v. *Nunan*, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879); *Breen* v. *Kahl, supra*, 296 F. Supp. at 705 n. 3. This is not a recent phenomenon for the length and style of hair has historically had political and ideological overtones. See, e.g., Appendix I, Mackay, *Extraordinary Popular Delusions and the Madness of Crowds*, at 346 et seq. For this reason the right recognized by the Court below is closely related to types of expression traditionally protected and is within the penumbra of the First Amendment. Note, *Symbolic Conduct*, 68 Col. L. Rev. 1091, 1093-1105 (collecting cases). Compare memorandum of Harlan, J., in **Cowgill** v. *California*, — U.S. — 38 Law Week 3266 (Jan. 20, 1970).

II. THE RIGHT TO EDUCATION AND TO ATTEND SCHOOL IS A FUNDAMENTAL RIGHT OF CRITICAL IMPORTANCE IN THE CONTEMPORARY WORLD

The right to take full advantage of the educational opportunities offered by the state should properly be characterized today as a fundamental right and liberty.

Participation in the educational process offered by the state has been recognized to have critical importance for a child's well being and development. **Brown** v. *Board of Education*, 347 U.S. 483, at 493 (1954) stressed that:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

See also **Hobson** v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.*, *Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969); "Developments — Equal Protection," 82 Harv. L. Rev. 1065, 1120, 1183-1187. And see **Griffin** v. *County School Board*, 377 U.S. 218 (1964).

Increasingly, a right to education has been seen as necessarily subsumed in the grant of specific constitutional rights. With respect to rights guaranteed to the criminal accused under the Fifth and Sixth Amendments, it is now established that those rights carry with them the right to be informed, that is educated, as to their existence and their manner of exercise. *Miranda* v. *Arizona*, 384 U.S. 436, 467-479 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 490 (1964).[4]

Similarly, the existence of the other rights and liberties specifically guaranteed by the Constitution predicates the right to be sufficiently informed and educated to enjoy them. First Amendment rights particularly require for their effective exercise today a level of informational and educational maturity that few can obtain other than through formal schooling. As the district court put it in *Breen* v. *Kahl, supra*, at 704.

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[4] In *Miranda* at 467-468 the court said specifically:

". . . to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights . . .

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privileges, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise."

> ". . . to deny a 16 year old eleventh-grade male and a 17 year old twelfth-grade male access to a public high school in Wisconsin is to inflict upon each of them irreparable injury for which no remedy at law is adequate. I made this finding by taking notice of the social, economic, and psychological value and importance today of receiving a public education through twelfth grade."

It is unreasonable to assume that an expelled or suspended student can obtain this education and training in some alternative fashion. Cf. ***McLaurin* v. *Oklahoma State Regents***, 339 U.S. 637, 641 (1950) (restrictions on use of educational facilities effectively prevent the learning of a profession). The deprivation of a person's right to attend school, therefore, carries with it the substantial risk of effectively depriving that person of specific constitutional liberaties. See ***Dixon* v. *Alabama State Board of Education***, 294 F.2d 150, 157 (5th Cir. 1961).

III. SINCE THE RIGHTS ASSERTED BY PLAINTIFF IN THIS CASE ARE FUNDAMENTAL ONES, NEITHER THEIR INFRINGEMENT NOR THEIR UNEQUAL ALLOCATION CAN BE JUSTIFIED WITHOUT SHOWING A COMPELLING STATE INTEREST

A. *The Action of the School Authorities Denies to Plaintiff The Equal Protection of the Laws.*

Whether we categorize the right involved as the right

of personal appearance and expression of personality or as the right to an education and to attend school, it is clear that it is fundamental and important. The equal protection clause of the Fourteenth Amendment prohibits a public institution from using classifications which circumscribe such a right except on a showing of "substantial justification." E.g., *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); See "Developments-Equal Protection" 82 Harv. L. Rev. 1065, 1120-1123, 1127-1131 and cases cited. Classifications which circumscribe or abridge one's rights to marry (*Loving* v. *Virginia*, 388 U.S. 1 [1967]), to vote (*Harper* v. ***Virginia*** *Board of Elections*, 383 U.S. 663 [1966]), to have offspring (*Skinner* v. *Oklahoma*, 316 U.S. 535 [1942]), and to travel (*Shapiro* v. *Thompson*, 394 U.S. 618 [1969]) have been subjected to this rigorous scrutiny.[5]

It should be noted that the rights to marry, to vote, to have offspring, and to travel are not rights expressly granted in the Constitution. Nevertheless, they are so fundamental to personal fulfillment in our society that any attempted abridgment by the state must be rigorously examined. Where fundamental rights such as these are at stake, the state must clearly demonstrate that the classification is supported by a compelling, legitimate and important state interest before it will be sustained. See cases cited above. So also here, rigorous scrutiny must accompany the state's attempt through the schools to prevent one class of persons—males with long hair—from appearing as they like.

The record in this case is devoid of any showing whatever that there is any legitimate interest of the state which supports this classification and justifies these deprivations of rights. Nor does appellant's brief advance any justification. And a statement that a pupil's expulsion is for the general benefit of the institution would be inadequate to save the classification. *Dixon* v. *Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). Nor is concern for the attitudes of other pupils sufficient. *Tinker* v. *Des Moines Indep. Commun. School Dist.*, 393 U.S. 503 (1969). There may be circumstances in the school (e.g., a machineshop class) where regulations with respect to hair length are appropriate. Such regulations must be sufficiently "tailored" to the circumstances, however, or they will be invalid. See *Shapiro* v. *Thompson*, *supra* at 1330; *Kramer* v. *Union Free School Dist.*, *supra.* The justification for the different and unequal treatment here is patently insubstantial. *McLaughlin* v. *Florida*, *supra* at 191 and cases cited. It withholds a state service, formal education, from one class of students for no legitimate reason. See, *Baxstrom* v. *Herold*, 383 U.S. 107, 111; *Rinaldi* v. *Yeager*, 384 U.S. 305, 309-310 (1966). It further involves an important aspect of personal freedom. *Breen* v. *Kahl*, *supra*, (7th Cir. 1969). See *Skinner* v. *Oklahoma*, *supra* at 536 (protecting a "sensitive and important area of human rights"); *Griffin* v. *Tatum*, *supra* at 62.

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[5] It is, of course, elementary that classifications based on race will be subjected to exacting scrutiny. *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964); *Takahashi* v. *Fish & Game Comm'n*, 334 U.S. 410, 420 (1948). But such scrutiny is by no means limited to those cases.

B. *In any event, the State's Action Is Arbitrary and Unreasonable.*

Even were the rights involved in this case not fundamental, the classification could not stand because it is wholly irrational and arbitrary. ***Levy* v. *Louisiana***, 391 U.S. 68, 72 (1967); *Turner* v. *Fouche*, — U.S. —, 38 Law Week 4090, 4094-93 (Jan. 19, 1970). **There can be no doubt that a classification based solely on a preference for hair cut to a short length is irrational and a violation of the**

Fourteenth Amendment. As was said in *Zachary* v. *Brown*, 299 F. Supp. 1360, 1362 (N.D. Ala., 1967):

> "The wide latitude permitted legislatures of the states and therefore the administrators of public colleges to classify students with respect to dress, appearance and behavior must be respected and preserved by the courts. However, the equal protection clause of the fourteenth amendment prohibits classification upon an unreasonable basis. This court is of the firm opinion that the classification of male students attending Jefferson State Junior College by their hair style is unreasonable and fails to pass constitutional muster.
>
> It needs to be emphasized that the defendants have not sought to justify such classification for moral and social reasons. The only reason stated upon the hearing of this case was their understandable personal dislike of long hair on men students. The requirement that these plaintiffs cut their hair to conform to normal or conventional styles is just as unreasonable as would palpably be a requirement that all male students of the college wear their hair down over their ears and collars."

As the court below noted in this case, there appears to be no motive for prohibiting long hair save the personal taste of the defendants. See *Yick Wo* v. *Hopkins*, 118 U.S. 356, 374 (1886) ("no reason for it exists except hostility"). This motive is indeed palpably arbitrary, and incapable of sustaining a classification based upon it. Like the police conduct condemned in *Wright* v. *Georgia*, 373 U.S. 284 (1963) we have here simply the arbitrary assertion of official authority.

C. *The appellant offered no evidence that the appellee had himself disturbed the educational environment.*

The state's action violates the due process clause as well as being a denial of equal protection. When seeking to abrogate or diminish a basic personal freedom *the state* must demonstrate a substantial burden of justification. *Griswold* v. *Connecticut, supra; U. S.* v. *O'Brien*, 391 U.S. 367 (1968); *Shapiro* v. *Thompson, supra; Kramer* v. *Union Free School District, supra; Bates* v. *Little Rock, supra.* (1960). The "minimum rationality standard" test used in assessing the constitutionality of economic regulations cannot be and has never been the criterion in matters dealing with the personal freedom of an individual. To hold otherwise would deprive basic constitutional guarantees of any real meaning since the government seldom acts wholly irrationally. See Frantz, *The First Amendment in the Balance*, 71 Yale L. J. 1424, 1448.

Here, defendant offered no evidence whatsoever that the appellee was either a disrupting or distractive influence at school. *Tinker* v. *Des Moines Independent Community School District, supra.* Even if evidence had been shown that other students were either districted or caused disturbances, such a showing would not be sufficient to meet the appellee's substantial burden. Hostility caused by others in response to the words, actions or, in this case, appearance of another, has never been sufficient grounds to deny the rights of the person against whom the hostility is directed. *Terminiello* v. *Chicago*, 337 U.S. 1 (1949); *Cooper* v. *Aaron*, 358 U.S. 1 (1958); *Watson* v. *Memphis*, 373 U.S. 526 (1963); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963); *Tinker* v. *Des Moines Independent Community School District, supra.* The fact that conforming students are distracted by the natural personal appearance of non-conforming students cannot, therefore, provide a basis for denying the right to be a non-conformist. In order for any school administration even to begin to meet its burden of justification for denying a student's basic personal freedom, it must show that its primary function of educating all of its students has been substantially interrupted by the non-conforming students, to the measureable detriment of the student body, *and that no alternative means are readily available to deal with the situation.* Basic rights cannot be sacrificed on any lesser showing. *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *United States* v. *O'Brien, supra; Shapiro* v. *Thompson, supra; Kramer* v. *Union Free School District, supra; Tinker* v. *Des Moines Independent Community School District, supra; NAACP* v. *Alabama*, 377 U.S. 288 (1964).

Unlike regulation of dress or other regulations which are in many ways analogous, a regulation of the length of a student's hair has a direct and unavoidable consequence upon the life and liberty of the individual outside of school. It is impossible to cut one's hair for purposes of attendance at school and still wear one's hair at the length desired at home or at other places outside the school. To regulate the length of student's hair effectively means regulating student's hair at all places and at all times outside the school in direct violation of the wishes and rights of the students and their parents. *Breen* v. *Kahl, supra* (7th Cir. 1969); *Westley* v. *Rossi, supra.*

IV. The Action of the Appellee, Being Based Upon His Personal Taste Rather Than Upon a Narrowly Drawn Regulation, Violated the Due Process Clause of the Fourteenth Amendment.

The District Court advanced another ground for invalidating the suspension order: the lack of any specific regulation under which the principal suspended the plaintiff. Suspension is a serious sanction. The judge was plainly correct. This requirement of specificity is no less necessary when dealing with suspension or expulsion from school than when dealing with other forms of punishment. E.g., *Tinker v. Des Moines Independent School District, supra. Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089 (8th Cir. 1969). Such a serious penalty requires that action be taken only under a precise regulation which clearly delimits the scope of authority. *Massachusetts Welfare Rights Organization v. Ott*, — F.2d — (1st Cir., No. 7392, decided Nov. 6, 1969.) This is not only because of the lack of fair notice but more important *to prevent the exercise of arbitrary* administrative action. "Vague standards, unless narrowed by interpretation, encourage erratic administration. . ." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 685 (1968); see also Amsterdam, Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 90. Here, of course, the standards are not simply vague, they are totally lacking.

The unlimited discretion exercised in this case is apparent here in the following statement:

> "We take pride in the appearance of our students. Your dress reflects the quality of the school, of your conduct and of your school work.
>
> All students are expected to dress and groom themselves neatly in clothes that are suitable for school activities." (A. 33, Def. Ex. A)

The "reasons" given by the defendant are in fact simply an assertion by the school of unbridled discretion on sartorial matters, backed up by the power of suspension. *Wright v. Georgia, supra.* Whether or not the plaintiff has a basic personal right to choose his hair style, the arbitrary action of the defendant in punishing the plaintiff based upon a complete lack of standards would have to be prohibited as a denial of due process.

V. The District Court Did Not Err in Exercising Jurisdiction Over Plaintiffs' Claim Under the Civil Rights Act of 1871.

The defendant asserts that the District Court "erred in exercising jurisdiction over plaintiffs' claim under the Civil Rights Act." (Br. p. 18). Two grounds are advanced in support of this contention: first, that §1893 "does not apply to plaintiffs' hair style claim" (Br. pp. 18-22); and secondly, that "as a matter of sound discretion, [the court] should have deferred action on the complaint to the Massachusetts courts." (Br. p. 22). Neither contention has substance.

A. *Section 1983 Applies to This Type of Action.*

Defendant's contention that the Civil Rights Act, 42 U.S.C. §1983 does not apply to this type of action is without focus and exceedingly difficult to understand. In the beginning of his discussion, defendant apparently contends that since the Civil Rights Act was part of the Reconstruction Era legislation, it should be limited to claims by Negroes that they have been unconstitutionally discriminated against. (Br. p. 19). That argument is, of course, utterly without substance. As the District Court recognized, the precise scope of §1983 and of its jurisdictional counterpart, 28 U.S.C. §1343, is somewhat uncertain. But jurisdiction under §1343 has been utilized to enforce a whole range of constitutional rights having nothing to do with race. E.g., *Baker v. Carr*, 369 U.S. 186, 200, n. 19 (1962); *King v. Smith*, 392 U.S. 309, 312 n. 4 (1968); *Caperici v. Huntoon*, 397 F.2d 799 (1st Cir. 1968). 28 U.S.C. 1343 grants jurisdiction, and §1983 creates a remedy, for any substantial claim by the plaintiffs that state officers are denying constitutional rights

The relevant authorities have been recently reviewed by Judge Friendly in *Eisen* v. *Eastman*, — F.2d — (2d Cir. Nov. 28, 1969, Docket No. 32909, CCH Poverty Law Reporter Par. 10,679).[6]

The confusion in defendant's brief is readily apparent. Much of their discussion on the point of lack of jurisdiction argues that no "jurisdiction" exists under 42 U.S.C. §1983. Plainly, this confuses questions of jurisdiction with those of substantive law. Section 1983 is not a jurisdictional statute; it provides a remedy for the deprivation by state officials of certain federal constitutional rights; The appropriate jurisdictional statute to enforce §1983 claims is 28 U.S.C. §1343. Defendant's claim that hair styling is not "a right, privilege, or immunity secured by the Constitution" (Br. p. 20) under §1983 is, therefore, an argument addressed to the merits of plaintiffs' claim, not to the jurisdiction of the District Court. *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946).

B. *The District Court Should Not Have Abstained.*

Defendant also contends that the District Court should have "deferred action on the complaint to the Massachusetts courts." (Br. p. 22). We assume that this is an abstention argument of some sort. It is interesting to note that the discussion does not raise any of the usual grounds of abstention; namely, that the state law is unclear and that a constitutional decision might be avoided by resorting to the state court to resolve an ambiguous issue of state law. Nor could defendant now raise this argument. First, the Supreme Judicial Court has already upheld the power of local school districts to make regulations of this character. *Leonard* v. *School of Attleboro*, 349 Mass. 704 (1965).

Secondly, the whole abstention doctrine in the area of fundamental rights involving freedom of speech and rights of a similar nature has been substantially eroded, and has no applicability to situations where, as here, there is no reasonably apparent construction of a statute or regulation which would avoid the constitutional question. *Zwickler* v. *Koota*, 389 U.S. 241 249-50, (1967); *Henley* v. *Wise*, 303 F. Supp. 62, 65 (N.D. Ind. 1969) (three judge court). Finally, defendant made no argument for abstention in the trial court and accordingly cannot raise that defense here for the first time.[7] Abstention is clearly a doctrine of judicial discretion, not of jurisdiction. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328-29 (1964).

As we indicated, however, defendant does not make a conventional abstention argument. Simply stated, their argument is that the District Court should have abstained because the Massachusetts courts can be counted on to enforce plaintiffs' constitutional rights, if any. (Br. pp. 22-27). That argument is far wide of the mark. It wholly misconceives the role of the federal courts in the enforcement of fundamental constitutional rights. The federal courts are "the *primary* and powerful reliances for vindicating every right given by the Constitution." *Zwickler* v. *Koota*, *supra* at 247. italics in original) See Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 549-51. To say, therefore, that the state courts will enforce federal constitutional rights provides no basis for a conclusion that a case is improperly brought in the federal courts. *Zwickler* v. *Koota*, at 248. If it did, very few cases indeed could be prosecuted in the federal courts since it cannot be assumed that any state court will refuse to enforce federal constitutional claims. U.S. Const. Art. VI §2.

The short answer to defendant's argument is, therefore, that it misconceives the import of §1983. Under that section there is no requirement that a plaintiff exhaust his state administrative remedies before resorting to the federal court. *King* v. *Smith*, 392 U.S. 309, 312 n. 4. The same is true, *a fortiori,* with respect to state judicial remedies. *Monroe* v. *Pape*, 365 U.S. 167, squarely rejects defendant's argument:

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[6] Despite defendant's attempt so to consider it, *Monroe* v. *Pape*, 365 U.S. 167 (1961) was not a racial discrimination case.

[7] Indeed, its answer conceded the existence of "jurisdiction". (A. [illegible] Def. Answer, par. 1).

> "It is no answer that State has a law which is enjoined would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be the first sought and refused before the federal one is revoked." (Id. at 183)

McNeese v. *Bd. of Education*, 373 U.S. 668, 672, and *Zwickler* v. *Koota, supra* at 248, reaffirm the principle. See also *Damico* v. *California*, 389 U.S. 416, 417 (1967). Not surprisingly, therefore, in *Breen* v. *Kahl, supra,* (7th Cir. 1969), the Court of Appeals considered the merits of a claim identical to that asserted here, without any doubt about its jurisdiction to do so. The District Courts have been unanimous in reaching the merits of the claims presented here. E.g., *Zachary* v. *Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967); *Griffin* v. *Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969); *Westley* v. *Rossi, supra.*

CONCLUSION

The decision of the District Court should be sustained.

Respectfully submitted,

Robert Richards, Jr.
by his attorneys,
Daniel D. Levenson
Spencer Neth
Henry P. Monaghan

John H. Henn
on brief.

United States Court of Appeals
For the First Circuit

No. 7455.

ROBERT RICHARDS, JR.,
a minor by his father and next friend
ROBERT RICHARDS,
PLAINTIFF, APPELLEE,
v.
ROGER THURSTON,
as Principal of Marlboro High School,
DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

David G. Hanrahan, with whom *William J. Brennan*, City Solicitor, *George A. McLaughlin, Jr.*, and *The McLaughlin Brothers* were on brief, for appellant.

Henry P. Monaghan, with whom *Daniel D. Levenson*, *Spencer Neth* and *John H. Henn* were on brief, for appellee.

Gerard F. Doherty, on brief for Massachusetts Secondary School Principals Association, amicus curiae.

April 28, 1970.

COFFIN, *Circuit Judge*. Plaintiff, a seventeen year old boy, was suspended from school at the beginning of his senior year because he refused to cut his hair, which a local newspaper story introduced into evidence described as "falling loosely about the shoulders". Defendant, the principal of the high school in Marlboro, Massachusetts, admits that there was no written school regulation governing hair length or style but contends that students and parents were aware that "unusually long hair" was not permitted.

On these sparse facts the parties submitted the case posed by plaintiff's request for injunctive relief against the deprivation of his rights under 42 U.S.C. § 1983. Each relied on the failure of the other to sustain his burden of proof, plaintiff claiming that he should prevail in the absence of evidence that his appearance had caused any disciplinary problems, and defendant maintaining that plaintiff had failed to carry his burden of showing either that a fundamental right had been infringed or that defendant had not been motivated by a legitimate school concern. The district court granted plaintiff's request for a permanent injunction and ordered plaintiff reinstated. *Richards* v. *Thurston*, 304 F. Supp. 449 (D. Mass. 1969).

Defendant, apart from his argument on the merits, insists that the district court erred in not abstaining pending consideration by the courts of the Commonwealth of Massachusetts. We are in entire sympathy with the proposition that questions involving school board authority ought to be resolved whenever possible on a nonconstitutional basis.[1] In this case, however, we agree with the district court that *Leonard* v. *School Committee of Attleboro*, 349 Mass. 704 (1965), a case containing similar facts, forecloses that nonconstitutional approach and clearly suggests that the courts of Massachusetts would have ruled against plaintiff on these facts.[2]

Plaintiff, too, advances a narrow argument for prevailing —the lack of any specific regulation authorizing suspension for unusual hair styles. We do not accept the opportunity. We take as given defendant's allegation in his answer that parents and students—including plaintiff—were aware that unusually long hair was not permitted. Moreover, we would not wish to see school officials unable to take appropriate action in facing a problem of discipline or distraction simply because there was no preexisting rule on the books.

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[1] For a thoughtful discussion, *see* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. Pa. L. Rev. 373 (1969).

[2] *See Monroe* v. *Pape*, 365 U.S. 167, 183 (1961); *McNeese* v. *Board of Education*, 373 U.S. 668, 671-674 (1963).

Coming to the merits, we are aware of a thicket of recent cases concerning a student's wearing of long hair in a public high school.[3] While several of the decisions holding against the student have relied on the prior occurrence of disruptions caused by unusual hair styles,[4] we think it fair to say that many of those courts would hold against the student on a barren record such as ours, on the grounds that the student had not demonstrated the importance of the right he asserts. On the other hand, in few of the cases holding for the student was there any evidence of prior disruptions caused by hair styles. Despite the obvious disagreement over the proper analytical framework, each of the "pro-hair" courts held explicitly or implicitly that the school authorities failed to carry their burden of justifying the regulation against long hair.

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[3] Decisions holding against the student include the following: *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968); *Davis* v. *Firment*, 269 F. Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969); *Crews* v. *Clones*, 303 F. Supp. 1370 (S.D. Ind. 1969); *Brick* v. *Board of Education*, 305 F. Supp. 1316 (D. Colo. 1969); *Stevenson* v. *Wheeler County Board of Education*, 306 F. Supp. 97 (S.D. Ga. 1969) (mustaches); *Akin* v. *Board of Education*, 262 Cal. App. 187 (1968); *Neuhaus* v. *Torrey*, 38 U.S.L.W. 2516 (N.D. Cal., March 10, 1970); and *Leonard* v. *School Committee of Attleboro*, *supra*. Several decisions gave considerable weight to the evidence of prior disruptions of the school atmosphere caused by unusual hair styles. *E.g.*, *Ferrell*, *Davis*, *Brick*. The *Crews* decision relied on the fact of prior disruptions concerning the particular plaintiff there involved.

Ranged against these authorities are the following cases holding for the student: *Finot* v. *Pasadena City Board of Education*, 58 Cal. Rptr. 520 (Cal. App. 1967) (First Amendment); *Meyers* v. *Arcata Union High School District*, 75 Cal. Rptr. 68, 72-73 (Cal. App. 1969) (First Amendment); *Sims* v. *Colfax Community School District*, 307 F. Supp. 485 (S.D. Iowa 1970) (Due Process Clause protects female student's long hair); *Breen* v. *Kahl*, 296 F. Supp. 702 (W.D. Wis. 1969) (Due Process Clause), *aff'd*, 419 F.2d 1034 (7th Cir. 1969); ("penumbra" of First Amendment or Ninth Amendment); *Calbillo* v. *San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969) (Equal Protection Clause in a junior college context); *Zachry* v. *Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967) (Equal Protection Clause); *Griffin* v. *Tatum*, 300 F. Supp. 60 (M.D. Ala. 1969) (Equal Protection Clause and Due Process Clause); *Westley* v. *Rossi*, 305 F. Supp. 706 (D. Minn. 1969) (same).

In *Farrell* v. *Smith*, F. Supp. (D. Me. 1970), the court explicitly accepted the proposition that the right to wear one's hair at any length is an aspect of personal liberty protected by the Due Process Clause of the Fourteenth Amendment, following the "pro-hair" cases cited above. However, the court on the facts before it held that the state vocational school had met its substantial burden of justification by a showing that neatness of appearance enhanced the employment opportunities of its students.

What appears superficially as a dispute over which side has the burden of persuasion is, however, a very fundamental dispute over the extent to which the Constitution protects such uniquely personal aspects of one's life as the length of his hair, for the view one takes of the constitutional basis—if any—for the right asserted may foreshadow both the placement and weight of the evidentiary burden which he imposes on the parties before him. For this reason, we resist the understandable temptation, when one is not the final arbiter of so basic a constitutional issue, to proceed directly to an application of the constitutional doctrine without attempting to ascertain its source as precisely as possible.

It is perhaps an easier task to say what theories we think do *not* apply here. We recognize that there may be an element of expression and speech involved in one's choice of hair length and style, if only the expression of disdain for conventionality. However, we reject the notion that plaintiff's hair length is of a sufficiently communicative character to warrant the full protection of the First Amendment. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968); *Tinker* v. *Des Moines School District*, 393 U.S. 503, 507-508 (1969); *see Cowgill* v. *California*, 396 U.S. 371 (1970), Harlan, J. concurring; *cf. Close* v. *Lederle*, F.2d (1st Cir. 1970), filed this date. That protection extends to a broad panoply of methods of expression, but as the non-verbal message becomes less distinct, the justification for the substantial protections of the First Amendment becomes more remote. Nor do we see the logic of expanding the right of marital privacy identified in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), into a right to go public as one pleases.[5]

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[4] *See also* two Fifth Circuit "freedom button" cases expressly differentiated because of the disruptive response to the plaintiffs in the latter case which had not occurred in the former: *Burnside* v. *Byars*, 363 F.2d 744 (5th Cir. 1966), and *Blackwell* v. *Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966).

Our rejection of those constitutional protections in this case is not intended to denigrate the understandable desire of people to be let alone in the governance of those activities which may be deemed uniquely personal. As we discuss below, we believe that the Due Process Clause of the Fourteenth Amendment establishes a sphere of personal liberty for every individual, subject to reasonable intrusions by the state in furtherance of legitimate state interests.[6]

The idea that there are substantive rights protected by the "liberty" assurance of the Due Process Clause is almost too well established to require discussion. Many of the cases have involved rights expressly guaranteed by one or more of the first eight Amendments.[7] But it is clear that the enumeration of certain rights in the Bill of Rights has not been construed by the Court to preclude the existence of other substantive rights implicit in the "liberty" assurance of the Due Process Clause. In the 1920's the Court held that such "liberty" includes the right of parents to send their children to private schools as well as public schools and to have their children taught the German language. *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390, 399-400 (1923). In 1958, the Court held that "the right to travel [to a foreign country] is a party of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." *Kent* v. *Dulles*, 357 U.S. 116, 125 (1958); followed in *Aptheker* v. *Secretary of State*, 378 U.S. 500, 505-506 (1964). More recently, the Court, without specifically ascribing its source, established the right to travel interstate as a right fundamental to our Federal Union despite the absence of any specific mention thereof in the Constitution. *United States* v. *Guest*, 383 U.S. 745, 757, 759 (1966); *Shapiro* v. *Thompson*, 394 U.S. 618, 629-631 (1969). Such a right of interstate travel being more inherent in and essential to a Federal Union than the right to travel abroad established in *Kent* and *Aptheker*,[8] we can only conclude that such right must a fortiori be an aspect of the "liberty" assured by the Due Process Clause.

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[5] That "privacy" has not been generally understood in the latter sense is indicated by the definition of privacy given by Alan F. Westin in his wide-ranging book *Privacy and Freedom*, (1967), at p. 7: "Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."

[6] The fact that the "liberty" protected by the Due Process Clause includes such a sphere of personal liberty does *not* require the state to provide a special forum for the exercise of such personal liberty. Moreover, having provided a forum, the state may revoke it when the exercise of personal liberty becomes inimical to the societal interests affected by such use of the state's forum. *Cf., Close* v. *Lederle*, *supra.* Of course, when the activity takes on the coloration of a First Amendment right, only a more compelling interest will justify a limitation on such activity. *United States* v. *O'Brien*, *supra* at 376-377.

We do not say that the governance of the length and style of one's hair is necessarily so fundamental as those substantive rights already found implicit in the "liberty" assurance of the Due Process Clause, requiring a "compelling" showing by the state before it may be impaired. Yet "liberty" seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty. As the Court stated in *Union Pacific Railway Co.* v. *Botsford,* 141 U.S. 250, 251 (1891):

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[7] *See e.g.*, *Schneider* v. *United States*, 308 U.S. 147, 160 (1939); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-305 (1940); *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958); *Railroad Trainmen* v. *Virginia Bar*, 377 U.S. 1 (1964).

[8] *See* discussion in *Guest*, *supra*, and *Shapiro*, *supra*, and *see* Stewart, J. concurring in *Shapiro* at 642-643.

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right of one's person may be said to be a right of complete immunity: to be let alone.' "[9]

Indeed, a narrower view of liberty in a free society might, among other things, allow a state to require a conventional coiffure of all its citizens, a governmental power not unknown in European history.[10]

We think the Founding Fathers understood themselves to have limited the government's power to intrude into this sphere of personal liberty, by reserving some powers to the people.[11] The debate concerning the First Amendment is illuminating. The specification of the right of assembly was deemed mere surplusage by some, on the grounds that the government had no more power to restrict assembly than it did to tell a man to wear a hat or when to get up in the morning. The response by Page of Virginia pointed out that even those "trivial" rights had been known to have been impaired—to the Colonists' consternation—but that the right of assembly ought to be specified since it was so basic to other rights.[12] The Founding Fathers wrote an amendment for speech and assembly; even they did not deem it necessary to write an amendment for personal appearance.[13] We conclude that within the commodious concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes.

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[9] In more recent cases, the Court has weighed this right to the control over one's own person against the state interest underlying the state's intrusion. *Rochin* v. *California*, 342 U.S. 165, 172 (1952); *Breithaupt* v. *Abram*, 352 U.S. 432, 439 (1957); *cf. Schmerber* v. *California*, 384 U.S. 757 (1966).

[10] *See* W. and A. Durant, *The Story of Civilization: Part VIII, The Age of Louis XIV*, 396-410 (1963) (account of Peter the Great's proscription of beards).

[11] Redlich, "Are There 'Certain Rights . . . Retained By The People'?", 37 N.Y.U.L. Rev. 787, 804-812 (1963).

Determining that a personal liberty is involved answers only the first of two questions. The second is whether there is an outweighing state interest justifying the intrusion. The answer to this question must take into account the nature of the liberty asserted, the context in which it is asserted, and the extent to which the intrusion is confined to the legitimate public interest to be served. For example, the right to appear au naturel at home is relinquished when one sets foot on a public sidewalk. Equally obvious, the very nature of public school education requires limitations on one's personal liberty in order for the learning process to proceed. Finally, a school rule which forbids skirts shorter than a certain length while on school grounds would require less justification than one requiring hair to be cut, which affects the student twenty-four hours a day, seven days a week, nine months a year. *See Westley v. Rossi*, 305 F. Supp. at 713-714.

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[12] This exchange is reported and discussed in Irving Brant's *The Bill of Rights*, 53-67 (1965). As the author there points out, the reference to the wearing of hats had considerable meaning to the participants of the debates, recalling William Penn's trial for disturbing the peace. Upon entering the courtroom bareheaded, Penn was directed by a court officer to don his hat, after which he was fined by the court for not doffing his hat.

[13] Remarks of James Madison, reported and discussed in Redlich article cited in n. 10 *supra*.

Once the personal liberty is shown, the countervailing interest must either be self-evident or be affirmatively shown. We see no inherent reason why decency, decorum, or good conduct requires a boy to wear his hair short. Certainly eccentric hair styling is no longer a reliable signal of perverse behavior. We do not believe that mere unattractiveness in the eyes of some parents, teachers, or students, short of uncleanliness, can justify the proscription. Nor, finally, does such compelled conformity to conventional standards of appearance seem a justifiable part of the educational process.

In the absence of an inherent, self-evident justification on the face of the rule, we conclude that the burden was on the defendant. Since he offered no justification, the judgment of the district court must be affirmed.

Affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHASTA HATTER, a minor, by JANE GORDON, her next friend and JULIE JOHNSTON, a minor, by CAROLINE (DANIELS) CONNELL, her next friend, both individually and on behalf of all others similarly situated.

Plaintiffs-Appellants,

vs.

LOS ANGELES CITY HIGH SCHOOL DISTRICT; LOS ANGELES CITY BOARD OF EDUCATION; ARTHUR F. GARDNER (President of the Los Angeles City Board of Education), RICHARD E. FERRARO, GEORGIANA HARDY, JULIAN NAVA, DONALD NEWMAN, and each of them, both individually and as members of the Los Angeles City Board of Education; JACK P. CROWTHER, individually and as Superintendent of the Los Angeles City School District; ROBERT ROZANKO, individually and as Principal of Venice High School; SHIELA HIRSHBERG, individually and as Vice-Principal of Venice High School; JOY LOFFENBERGER, individually and as teacher and administrative assistant at Venice High School, MAXIN ROBERTS, individually and as teacher at Venice High School,

Defendants-Appellees.

No. 26,031

[November 22, 1971]

On Appeal from the United States District Court
for the Central District of California

Before: MERRILL, BROWNING and HUFSTEDLER, Circuit Judges

MERRILL, Circuit Judge:

Plaintiffs Shasta Hatter and Julie Johnston, students at Venice High School in Los Angeles, protested their school's dress code by urging students to boycott the school's annual chocolate drive, which was being conducted to raise money for various student functions. Hatter passed out leaflets before school from a street corner across from the school grounds. She was suspended from school for the duration of the chocolate drive. Johnston wore a tag on her dress with the militant slogan: "Boycott Chocolates." The tag was removed from her dress by school administrators. She was reprimanded and threatened with suspension if she were to wear it again.

Plaintiffs brought a class action under 42 U.S.C. §1983 alleging infringement of their constitutional rights of free speech and due process. They sought an injunction against further interference with peaceful protest by passing out leaflets and wearing tags, a declaration of their right to distribute leaflets off campus and wear tags on campus that expressed criticism of school policies, an order requiring school officials to expunge from school records all mention of the disciplinary action taken against them, and damages and costs.

The District Court denied plaintiffs' request for a preliminary injunction and, sua sponte, dismissed the complaint without leave to amend on the ground that it failed to state a claim and could not be cured by amendment. 310 F.Supp. 1309 (C.D.Cal. 1970). This appeal followed.

1. *Denial of Temporary Injunction*

The court denied the injunction on two grounds. First, it concluded that the controversy had been rendered moot in that Hatter's suspension had ended, the chocolate drive was over, the dress code had been modified (although not to plaintiffs' complete satisfaction) and there was no allegation of any specific act threatened by school administrators that warranted court intervention. Appellees before us suggest that since the decision below new developments have added further support to the court's ruling in this respect: neither Hatter nor Johnston is now a student at Venice High School, and the dress code has now been repealed.

Whether repeal of the dress code puts an end to any continuing controversy with respect to the rights of students of Venice High School peacefully to protest school policies is a question we need not reach and, in our view, one we should not attempt to determine

on the inadequate record before us. However, so long as disciplinary measures taken against Hatter and Johnston remain unexpunged from school records they threaten prejudice with respect to college admission and future employment. On this basis we conclude that the District Court was in error in ruling that the controversy had been rendered moot.

The temporary injunction was denied on the further ground that there was no showing of urgency or need for interlocutory relief. We find no abuse of discretion in this respect. Accordingly, the order denying a temporary injunction is affirmed.

2. *Dismissal*

It appears that the District Court was under the impression that the disciplining of Hatter and Johnston was for violation of school regulations respecting the distribution of material on school grounds without permission, and that the issue presented was as to the right of the school to restrain First Amendment rights by resort to such regulation. However, this was not the case. The record does not indicate that any regulation was violated or that discipline was imposed for such violations or for disobedience of any order.

The opinion of the District Court also suggests that schools should be free to restrain the expression of opinion by students so long as the subject of discussion does not relate to issues of "great national concern." It concluded that the matter here at issue was "without weight or substance and * * * raises no question of constitutional proportions." On this basis the lower court sought to distinguish *Tinker v. Des Moines Indep. Community School District*, 393 U.S. 503 (1969).

In this we disagree. At issue is the right of students peacefully to protest policies of their school that serve to restrain their freedom of action. That these policies may not directly affect the adult community or concern the nation as a whole is of no moment. As stated in *Tinker, supra*, at 511: "Students in school as well as out of school are 'persons' under our Constitution." They are entitled in the absence of compelling countervailing considerations to exercise their First Amendment right to freely express themselves upon those issues which concern them. It is not for this or any other court to distinguish between issues and to select for constitutional protection only those which it feels are of sufficient social importance.[1]

Before us the appellees support dismissal (and seek further to distinguish *Tinker*) on the ground that appellants' actions served to disrupt orderly school operations. This fact does not appear from the complaint, however, and thus does not warrant dismissal for failure of the complaint to state a claim. The nature of the asserted disruption is set forth in affidavits of teachers who found it difficult to persuade their students to confine themselves to their classroom subjects since the students wished to discuss the proposed boycott. Appellants contend that any disruption that occurred was not material, that it was not such a disruption as can be attributed to them, that they did not advocate or foment it, and that if it resulted it was due to the discussability of the thoughts they expressed and lack of restraint on the part of the students.[2]

The issue of disruption thus remains to be resolved by further proceedings below in which the facts can be more fully developed and the applicable law ascertained.

Upon its order of dismissal, the District Court is reversed and the matter remanded with directions to vacate that order and to conduct further proceedings.

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[1] *See Thomas v. Collins*, 323 U.S. 516, 531 (1945) ("the rights of free speech and a free press are not confined to any field of human interest").

[2] Also presented in this case is the question—raised by the action taken against Hatter—as to the constitutional acceptability of interference by school officials with protected expressive activity engaged in outside of school grounds, whatever the subsequently developing factual context of that activity. *See Sullivan v. Houston Indep. School Dist.*, 307 F.Supp. 1328, 1340-41 (S.D.Tex. 1969); *Buttny v. Smiley*, 281 F.Supp. 280, 286 (D.Colo. 1968); 1 T. Emerson, D. Haber & N. Dorsen, *Political and Civil Rights in the United States*, 1045, 1047 (3d ed. 1967); *Developments in the Law—Academic Freedom*, 81 Harv.L.Rev. 1045, 1132 (1968).

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III. PROCEDURAL DUE PROCESS

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA

LEWIS JONES, by his mother and natural guardian, HURLEY JONES, on behalf of himself and all others similarly situated,	:	
Plaintiff	:	
vs.	:	FEBRUARY TERM, 1970
EDWARD GILLESPIE, principal of Strawberry Mansion Junior High School, on behalf of himself and all other school principals in the School District of Philadelphia and THE SCHOOL DISTRICT OF PHILADELPHIA,	:	NO. 4198
Defendants	:	TRIAL DIVISION

COMPLAINT IN EQUITY

1. Plaintiff is Lewis Jones, a minor, 15 years of age, residing with his mother, Hurley Jones, at 2012 N. 22nd Street, Philadelphia, Pennsylvania; plaintiff brings this action by his mother, on his own behalf and on behalf of all other students in the School District of Philadelphia.

2. The students in the School District of Philadelphia nunber approximately 290,000 and therefore constitute a class so numerous as to make it impracticable to join them all as parties plaintiff, and plaintiff will adequately represent their interest.

3. Defendant Edward Gillespie is principal of the Strawberry Mansion Junior High School, with offices in the school at Ridge and Susquehanna Avenues in Philadelphia, Pennsylvania; defendant Gillespie is sued as principal of the Strawberry Mansion Junior High School andas representative of the class of all school principals in the School District of Philadelphia.

4. The principals in the School District of Philadelphia number approximately 267 and therefore constitute a class so numerous as to make it impracticable to join them all as parties defendant, and defendant Gillespie will adequately represent their interest.

5. Defendant School District of Philadelphia is a political subdivision of the Commonwealth of Pennsylvania, with offices at 21st and the Parkway, Philadelphia, Pennsylvania.

6. Plaintiff Jones was a ninth grade student at Strawberry Mansion Junior High School until January 28, 1970, when he was suspended from school by defendant Gillespie.

7. Plaintiff Jones was remained suspended from January 28, 1970, to date, without ever having received any form of hearing whatsoever, and he has not been advised of any date upon which he will be re-admitted to school.

8. On January 19, 1970, defendant Gillespie advised plaintiff's counsel that plaintiff could return to school only upon condition that he not attend classes and remain in defendant Gillespie's office.

9. Plaintiff's suspension without a hearing, as aforesaid, violates plaintiff's rights under: Section 1318 of the School Code, 24 P.S. section 1318; (b) the Local Agency Law, 53 P.S. Section 11301 et seq.; (c) the Fourteenth Amendment to the United States Constitution.

10. It is a widespread invidious practice among class defendants to suspend class plaintiffs longer than temporarily without affording class plaintiffs any form of hearing or taking steps to permit the School Board of the School District of Philadelphia to afford them a hearing, all in violation of class plaintiffs' rights under aforesaid

laws. Class defendants will continue to violate class plaintiffs' rights as aforesaid unless restrained by this Court.

11. Despite knowledge of the aforesaid practice of class defendants, defendant School District of Philadelphia has failed or refused to take action, by regulation or otherwise, to end the unlawful suspensions and enforce and protect the rights of class plaintiffs under the laws set forth above.

12. Plaintiff and class plaintiffs have no adequate remedy at law.

13. Plaintiff and class plaintiffs are suffering and will continue to suffer irreparable harm from the practices complained of.

WHEREFORE, plaintiff and class plaintiffs, being without adequate remedy at law, and being in need of immediate relief, pray your Honorable Court for the following relief:

(a) That defendant School District of Philadelphia and defendant Gillespie be preliminarily and permanently enjoined from preventing plaintiff Jones from attending Strawberry Mansion Junior High School, unless and until the Philadelphia School Board or a duly authorized committee thereof decides to expel or suspend plaintiff from Strawberry Mansion Junior High School after a proper hearing;

(b) That defendant Gillespie and class defendants be preliminarily and permanently enjoined from suspending class plaintiffs for periods in excess of five days unless such longer suspension is authorized by the Philadelphia School Board or a committee thereof after proper notice and hearing.

(c) That defendant School District of Philadelphia be preliminarily and permanently ordered to take whatever action, by promulgation of regulations or otherwise, is necessary to enforce and protect the rights of class plaintiffs to a hearing before suspension in excess of five days;

(d) That plaintiff be awarded his costs in this action;

(e) That plaintiff and class plaintiffs be awarded such other and further relief as is necessary and appropriate.

s/
DANIEL E. FARMER

s/
MARTHA K. TREESE

s/
CHARLES H. BARON

DATE

s/
HARVEY N. SCHMIDT

IN THE COURT OF COMMON PLEAS
FOR THE COUNTRY OF PHILADELPHIA

LEWIS JONES, by his mother and natural guardian, HURLEY JONES, on behalf of himself and all others similarly situated,	:	FEBRUARY TERM, 1970
Plaintiff	:	
vs.	:	
EDWARD GILLESPIE, Principal of Strawberry Mansion Junior High School, on behalf of himself and all other school principals in the School District of Philadelphia and THE SCHOOL DISTRICT OF PHILADELPHIA,	:	NO. 4198 IN EQUITY
Defendants	:	

INTERROGATORIES TO DEFENDANT SCHOOL DISTRICT

Plaintiff propounds the following interrogatories to defendant Philadelphia School District, to be answered by Mark R. Shedd personally and under oath on the basis of his personal knowledge or on the basis of personal knowledge of employees of defendant Philadelphia School District or on the basis of information otherwise available (as hereinafter defined) to defendant Philadelphia School District.

These interrogatories are continuing, and supplementary answers are to be filed upon discovery of information which renders the prior answers substantially inaccurate, incomplete or untrue.

Those interrogatories calling for statistical information are to be answered for the most recent academic year for which such information is available (stating the year in the answer). "Available," as used in these interrogatories and the preamble thereto, means computable, compilable, inferable, or otherwise obtainable.

In addition to their meanings in ordinary English usage, the following terms used herein have the following further specific meanings:

Identify - state each of the following where available: title, author, names of sender and recipient, date of communication or delivery, present place of custody, name and address of present custodian, and form number.

Transfer - the transfer other than upon request, of a student, his parent or guardian, of attendance from the student's present school to attendance at any other school including transfer to a disciplinary school.

Disciplinary School - Daniel Boone, Oliver P. Cornman, or Octavius Catto schools.

School - a school of the Philadelphia School District.

District - except as otherwise indicated, one of the eight numbered, non-statutory sub-districts of the Philadelphia School District.

School District - except as otherwise indicated, the Philadelphia School District, including the political entity named, the Board of the Philadelphia School District, and any employee of the Philadelphia School District.

Document - any writing or recording of any kind, whether handwritten, typed or printed, including but not limited to: letters, memoranda, bulletins, resolutions, books, computer print-outs, papers, pamphlets, notebooks, recording tapes, discs and wires.

Suspension - every non-permanent exclusion of a student from school attendance by action of a School District employee, of whatever duration, and whether terminated by readmission, admission to another school, admission to a disciplinary school or otherwise.

1. State the number of students suspended from each Junior High School and High School, categorizing them as to duration into suspensions of:

   a) less than five days,

   b) more than five days but less than ten days,

   c) more than ten days but less than fifteen days,

   d) more than fifteen days.

2. State, for each Junior High School and High School, the ways in which suspensions terminate and state the number of suspensions terminated in each such category.

3. For each Junior High School and High School, state the number of students in each of the following categories:

   a) Transferred to another school,

   b) Expelled for misconduct,

   c) Expelled for reasons other than misconduct, stating such reason,

   d) Transferred to a disciplinary school,

   e) Any other transfer or exclusion from attendance.

4. State the information requested in the foregoing interrogatories sor Negro students alone.

5. State the number of suspension, expulsion or transfer hearings held before the School Board of defendant School District or a committee

thereof, and describe the procedures followed in such hearings.

6. State the number of suspension, expulsion or transfer hearings in which the presiding School District employee was a principal, and describe the procedures followed in such hearings.

7. State the number of suspension, expulsion or transfer hearings in which the presiding School District employee was a district superintendent, and describe the procedures followed in such hearings.

8. State the number of suspension, expulsion and transfer hearings in which the presiding School District employee was someone other than the School Board of defendant School District, a committee thereof, a principal or a district superintendent; state who presided, and describe the procedures followed in such hearings.

9. Identify and quote verbatim or attach the relevant sections of all documents promulgated by the School District and currently in force, governing procedures in expulsions, suspensions and disciplinary transfers.

10. State to whom are distributed any documents identified in answer to interrogatory number 9.

11. Identify all documents prepared by defendant School district containing regulations or administrative directives governing procedures in suspensions, expulsions or disciplinary transfers which have not been promulgated; quote verbatim or attach the relevant sections thereof and state why such regulations or directives were not promulgated.

12. State the number of times it has come to the attention of the Office of Legal Affairs, the Office of the Philadelphia District Superintendent, or the Office of Pupil Personnel and Counseling that principals or

district superintendents were not following the applicable law, regulations or administration directives governing suspensions, expulsions or disciplinary transfers.

13. State what measures have been taken by defendant School District to insure compliance by principals and district superintendents with the law, regulations, and administrative directives concerning suspensions, expulsions and disciplinary transfers.

14. Identify every document containing any information relevant to answering the foregoing interrogatories.

15. Identify the documents used in processing suspensions, expulsions or transfers.

16. State whether any alternative education is provided suspended students, and if so, describe such education fully, including but not limited to:

a) number of persons to whom provided,

b) criteria for eligibility,

c) curricula.

17. Should objections be sustained to any interrogatory herein on the ground that it calls for excessively burdensome investigation, computation or compilation of information, state, for each such objection, the sources from which the information sought may be derived by plaintiff and identify any relevant documents.

Date:______________________

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DANIEL E. FARMER

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MARTHA K. TREESE

____
CHARLES H. BARON

Counsel for Plaintiff

COMMUNITY LEGAL SERVICES, INC.
313 South Juniper Street
Philadelphia, Penna. 19107

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA

LEWIS JONES, by his mother and natural guardian, HURLEY JONES, on behalf of himself and all others similarly situated, Plaintiff vs. EDWARD GILLESPIE, Principal of Strawberry Mansion Junior High School on behalf of himself and all other school principals in the School District of Philadelphia and THE SCHOOL DISTRICT OF PHILADELPHIA, Defendants	FEBRUARY TERM, 1970 NO. 4198 IN EQUITY

STATEMENT OF THE CASE

Plaintiff Lewis Jones was a ninth grade student at Strawberry Mansion Junior High School until his suspension on January 28, 1970, by the principal of Strawberry Mansion, defendant Edward Gillespie, on the ground that he allegedly took a ten cent box of cookies from a fellow student.

Plaintiff's mother was informed on February 5, 1970, that her son would not be then readmitted to Strawberry Mansion, but would remain suspended pending further consideration of the case. Plaintiff has not had a hearing before the School Board of the Philadelphia School District and remains suspended to date.

Lewis Jones' plight is reflective of a widespread practice among class defendants to arbitrarily suspend students without hearings and keep them suspended without hearings for substantial periods of time at their pleasure. Defendant School District, with full knowledge of this routine deprivation of students' rights, looks on and does nothing.

ARGUMENT

I. DUE PROCESS REQUIRES A HEARING BEFORE SUSPENSION EXCEPT IN EXCEPTIONAL EMERGENCY SITUATIONS IN WHICH HEARING MAY BE PROVIDED AFTER SUSPENSION.

Due process requires a hearing whenever substantial rights of individuals are affected by government action. The Supreme Court held in Armstrong v. Manzo, 380 U.S. 545, 552 (1945), that a hearing "must be granted at a meaningful time and in a meaningful manner." In the absence of compelling circumstances, this means that the hearing must be afforded before the deprivation occurs. The Court has upheld the right to a hearing before essential interests are disturbed by state action in a variety of situations. Armstrong v. Manzo, supra (deprivation of parenthood); Cole v. Young, 351 U.S. 536 (1956) (dismissal from employment); Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1926) (accountant's qualifications to practice before the Board of Tax Appeals); Slochower v. Bd. of Bar Examiners, 353 U.S. 232 (1957) (right to take bar examination); Snaidach v. Family Finance Corp., 395 U.S. 337 (1969) (prejudgment garnishment).

Education is one of the most vital rights of an individual. As the Supreme Court recognized in Brown v. Board of Education, 347 U.S. 483 (1954):

> Today, education is perhaps the most important function of state and local governments,...In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

So important does the state deem education, that it is not only a right, but a compulsory requirement. 24 P.S. Section 13-1327.

It is clear therefore that any deprivation of state guaranteed and state required education must be consonant with due process. This proposition is well established. Dixon v. Alabama St. Board of Education, 294 F. 2d 150 (5th Cir.), cert. denied 368 U.S. 930 (1961), is the leading case extending the right of a hearing to students expelled from a University. The Court held that education was so essential that a hearing was constitutionally required before they could be so deprived. Accord, e.g.. Knight v. State Board of Education, 200 F. Supp. 174 (M.D. Tenn. 1961) and Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo, 1967).

Suspension is a deprivation of a student's rights with the same necessity of protection as expulsion. In Stricklin v. Regents of University of Wisconsin 297 F. Supp. 416 (W.D. Wisc. 1968), plaintiffs sought a temporary restraining order for their immediate reinstatement as students. The plaintiffs had been suspended because they had engaged in and incited acts of violence on campus which constituted large-scale riots. The plaintiffs were temporarily suspended pending a full hearing on further disciplinary action to be held 13 days later because university officials reasonably concluded that the students' continued presence would lead to further violence. Nevertheless the Court ordered the reinstatement of the students, for it concluded that due process required a preliminary hearing before even a temporary suspension, where no impossibility or unreasonable burden in holding such a preliminary hearing was shown.

The due process requirement of a prior hearing applies to school as well as college disciplinary actions. An individual's interest in receiving an elementary and secondary education is more essential than in receiving a college education, for without such education, an individual cannot survive in society.* In Woods v. Wright, 334 F. 2d 369 (5th Cir. 1964), the Court made no distinction between high school and college students. The Court granted a temporary restraining order to reinstate high school students who had been suspended without a hearing several days before the end of school. The shortness of time before the end of school and the availability of summer school were not exigencies enough to justify abrogation of the students' right to a hearing prior to suspension.

Students, therefore, have a vital interest in securing an education which must be protected from arbitrary action by government officials. To protect this interest, a hearing must be held before their education can be disrupted.

II. WHERE AN EMERGENCY JUSTIFIES SUSPENSION PRIOR TO A HEARING, DUE PROCESS REQUIRES A HEARING AS SOON AS PRACTICABLE AFTER SUSPENSION.

It has been recognized that due process permits state deprivation of rights prior to a hearing in the face of grave and immediate threat of serious injury to persons or property. Accordingly, suspension before hearing could conceivably be justified by extremely disruptive or dangerous behavior. The exception, however, is a narrow one, for the right abridged is elemental in our system of justice. Thus, Sticklin v. Regents of the University of Wisc., supra., held unconstitutional a 13 day temporary suspension without a prior hearing even though the Court assumed the truth of defendant's contention disorder and riot were threatened.

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*Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733 (1969), for example, recognized that school children have the full protection of the first amendment as against action by school officials.

III. TO ESCAPE CONSTITUTIONAL INVALIDITY SECTION 1318 OF THE SCHOOL CODE MUST BE CONSTRUED AS AUTHORIZING SUSPENSIONS BEFORE HEARINGS ONLY IN EMERGENCIES AND AS REQUIRING A HEARING WITHIN FIVE DAYS AFTER SUCH SUSPENSIONS.

Section 1318 of the Public School Code, 24 P.S. Section 13-1318, provides:

> Every principal or teacher in charge of a public school may temporarily suspend any pupil on account of disobedience or misconduct, and any principal or teacher suspending any pupil shall promptly notify the district superintendent, supervising principal, or secretary of the board of school directors. The board may, after a proper hearing, suspend such child for such time as it may determine, or may permanently expel him. Such hearing, suspension, or expulsion may be delegated to a duly authorized committee of the board.*

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*The district superintendent and supervising principal referred to are not officials of the numbered sub-districts of the Philadelphia School District, but are officials of the whole district. 24 P.S. Section 10-1071. Dr. Mark Shedd is both District Superintendent and Secretary of the School Board. There is no "Supervising Principal."

This statute must be construed so as to conform to the constitutional requirements of due process. Since due process requires a hearing before suspension, the statute can only be consistent if it is considered as authorizing summary suspensions only in cases of emergency.

If a student must be summarily suspended, then a hearing must be conducted as soon as it is reasonable to convene a hearing committee. Since the statute authorizes a hearing before a committee of the School Board, a committee of one member of the School Board could hold the hearing almost immediately. Certainly, five days is more than adequate.

Moreover, the purpose of the statute will be defeated if the student remains suspended for a substantial period of time, for the reinstated student will suffer an unjust academic penalty due to his absence from class. Absence for longer than five days gravely impairs academic standing.

Section 3214 (6) of the New York School Law governs suspensions and establishes a five day maximum suspension without a hearing.

> Section 3214. School for delinquents
>
> 6. Suspension of a minor. a. The board of education, board of trustees or sole trustee, the superintendent of schools, or district superintendent of schools may suspend the following minors from required attendance upon instruction:
> (1) A minor who is insubordinate or disorderly, or whose conduct otherwise endangers the safety, morals, health or welfare of others;
> (2) A minor whose physical or mental conditions endangers the health, safety, or morals of himself or of other minors;
> (3) A minor who, as determined in accordance with the provisions of part one of this article, is feebleminded to the extent that he cannot benefit from instruction.

> b. The board of education, board of trustees, or sole trustee may adopt by-laws delegating to the principal of the district, or the principal of the school where the pupil attends, the power to suspend a minor for a period not to exceed five school days.
> c. No pupil may be suspended for a period in excess of five school days unless such pupil and the person in parental relation to such pupil shall have had an opportunity for a fair hearing, upon reasonable notice, at which such pupil shall have the right of representation by counsel, with the right to question witnesses against such pupil. Such hearing shall be held before the superintendent of schools if the suspension was ordered by him. An appeal to the board of education shall lie from his decision upon such hearing. If the suspension shall have been ordered by the board of education, such hearing shall be before such board.*

New York City, with a school population three times that of Philadelphia's, has, in compliance with the statute, developed hearing procedures for suspension cases. Administrative burden cannot, therefore, justify a longer emergency suspension before hearing for Philadelphia.

IV. PLAINTIFF'S AND CLASS PLAINTIFFS' RIGHTS HAVE BEEN VIOLATED BY SUSPENSIONS WITHOUT HEARINGS IN NON-EMERGENCY SITUATIONS AND BY SUSPENSIONS EXCEEDING FIVE DAYS IN EMERGENCY SITUATIONS WITHOUT SUBSEQUENT HEARINGS.

It has been established that due process requires a hearing prior to suspension except in grave emergencies and then a hearing must be provided as soon as practicable. It has further been established that five days is an appropriate maximum.

The individual plaintiff in this case must be reinstated in school. His suspension was not valid as an emergency summary suspension since the principal, defendant Gillespie, could not reasonably regard his conduct as posing a grave and immediate threat to persons or property.

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*Section 3214 covers the provision for disciplinary schools as well as suspension, hence its title.

However, even assuming, arguendo, that the initial suspension was valid, his continuing suspension violates due process. The four weeks that the plaintiff has been suspended clearly exceeds any reasonable length of time necessary to afford him a hearing.

Class defendants have made a practice of violating the due process rights of class plaintiffs. Suspensions are routinely made without prior hearings in non-emergency situations, and in those few cases where an emergency does justify summary suspension, the notice required under section of 1318 to permit convening a hearing committee of the School Board is not given, and hearings are not held promptly, if at all.

Defendant School District, with full knowledge of these practices, has done nothing to protect the rights of its students against class defendants' unconstitutional practices, and, indeed, defendant School District has failed to adopt regulations drafted by its counsel in an attempt to cure the lawlessness of class defendants.

CONCLUSION

The Court's decision will have a profound effect on the rights of students in the Philadelphia School System. Our educational system should set an example by which students learn to respect legal procedures and justice. This cannot be accomplished when the system itself acts arbitrarily instead of insuring just and fair treatment to all students. For the reasons stated herein, plaintiff should be reinstated in Strawberry Mansion Junior High; and he and class plaintiffs should be protected against future suspensions without a prior hearing except in emergency situations. To insure these rights, the school district must be ordered to take measures to protect class plaintiffs' rights.

All of which is respectfully submitted.

DANIEL E. FARMER, ESQ.

MARTHA K. TREESE, ESQ.

February 26, 1970

CHARLES H. BARON, ESQ.

IN THE COURT OF COMMON PLEAS
FOR THE COUNTY OF PHILADELPHIA

LEWIS JONES, by his mother and natural guardian, HURLEY JONES, on behalf of himself and all others similarly situated, : FEBRUARY TERM, 1970

Plaintiff : NO. 4198

vs.

EDWARD GILLESPIE, Principal of Strawberry Mansion Junior High School, on behalf of himself and all other school principals in the School District of Philadelphia and THE SCHOOL DISTRICT OF PHILADELPHIA,

Defendants

ORDER

AND NOW, April 22, 1970, pursuant to the within consent of the parties it is hereby ORDERED and DECREED that:

1. Defendants, their agents, employees, and all others acting in concert with them, are hereby enjoined from suspending any student in the School District of Philadelphia from school attendance for a period longer than five days unless such longer suspension is authorized by the School Board of defendant School District or a committee thereof after proper hearing. A suspension shall not be deemed to exceed five days where a suspended student has been notified to return to school before five days but fails to do so through no fault of defendants.

2. In furtherance of this decree, defendant School District shall establish, by written regulations, effective procedures to ensure conformity to the aforesaid provisions of this decree, and defendant School District shall, in the preparation of such regulations, consider matters including but not limited to: formation of the hearing committee, notice by the principal to the committee, time, place, notice to the student, right to counsel, evidence to be considered, form of hearing and appeals therefrom, and consequences of failure to hold a hearing within five days. Such regulations shall be effective no later than September 30, 1970.

J. LEVIN J.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

LOIS OWENS, ET AL.)
)
VS) CIVIL ACTION NO. 69-1186
)
BERNARD DEVLIN, ET AL)
)
)

POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

PRELIMINARY STATEMENT

This case involves the discharge by the defendant Devlin from a predominately white public school of four black girls who have attended that school under the open enrollment policy promulgated by the defendant Boston School Committee. The girls have participated in the open enrollment plan for periods ranging from approximately three months to four and one-half years.

The plaintiffs deny involvement in the incident which allegedly resulted in their discharge from the Taft School. The girls were discharged without notice of the specific charges and without the right to confront the witnesses against them. No hearing was held to resolve the factual dispute.

The defendants respond to the plaintiffs' contention that the manner of their discharge denies them due process of law under the Fourteenth Amendment by saying that "conduct" is a condition of the "privilege" to attend an out-of-district school. The defendants assert that under the open enrollment policy a principal has the authority to withdraw this privilege, acting solely within his discretion and without reference to any standards, a hearing, or any right to review of the principal's decision.

The plaintiffs note that the defendants have applied to them disciplinary rules and procedures different from those applied to students whose parents reside within the geographic attendance zone for the Taft School. The plaintiffs contend that this is an arbitrary and capricious classification which denies them the equal protection of the laws guaranteed by the Fourteenth Amendment.

The plaintiffs also maintain that terming attendance at a public school a "privilege" does not deprive them of the protection of the Due Process Clause. The plaintiffs further assert that the use of "conduct" as a standard for the imposition of serious disciplinary sanctions denies them due process of law in that "conduct" is vague and overbroad, vests an adjudicatory official with unfettered discretion, and chills their First Amendment rights of free speech and association.

THE POLICY OF THE DEFENDANTS, BY WHICH THE WAY A STUDENT IS DISCIPLINED DEPENDS IN THEORY ON WHERE HE LIVES AND IN PRACTICE ON HIS RACE, DENIES THE PLAINTIFFS THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. THE DISTINCTION IS UNCONSTITUTIONAL EVEN IF REGARDED AS PURELY GEOGRAPHICAL.

The plaintiffs live outside the geographical district of the Taft Senior High School but attend that school under the Open Enrollment Policy of the Boston School Committee. They, together with all other students transferring to another district within the City of Boston,* are exposed to a discipline which the defendants do not apply equally to students living in their school's geographical district. The disparity in treatment takes at least three forms.

First, the standard of behavior imposed upon transfer students is vaguer and more severe. Section 215(3) of the Boston School Committee Regulations states that a student may be suspended from school for (a) "violent or pointed opposition to authority" or (b) "continued or flagrant violations of school discipline and good behavior." The defendants assert that this provision applies only to students who reside within the geographic district of the school which they attend.

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*No question is here presented involving attendance at schools not within the jurisdiction of the Boston School Committee.

They contend that transfer stddents attending a school under the Open Enrollment Plan do so as a "privilege" for which "conduct"is a "condition." On this basis they claim the right to impose, on such students alone, sanctions of all types--including suspension or total exclusion from the school which they have been attending--for breaches of "conduct." "Conduct" thus is in effect an omnibus standard applied only to transfer students, who are thereby denied the protection of Section 215(3).

The plaintiffs will show that"conduct" is interpreted by the responsible official to include "attitude," a term apparently defined largely in terms of the thinking and expression of improper thoughts. Without granting that the standards of behavior embodied in Section 215(3) are specific enough to comport with the requirements of due process of law, it may be observed that that section at least makes it clear that a resident student may be suspended only if his behavior presents either a severe or a repeated problem. A resident student may not be suspended for "attitude" or for isolated infractions requiring minor disciplinary action. And it must be remembered, entirely apart from the fact that the allegations of misconduct against the plaintiffs are vague and unproven, that they are at most charged with having "escorted" Brighton High School students into their school.

Second, transfer students may be permanently excluded from their school by an official who has no power so to exclude resident students. Section 215(3), which the defendants apply only to resident students, states that a principal may suspend a student for three school days; that a principal so doing must forthwith schedule a conference with the student's parents; and that if the student is not reinstated within three school days the matter must be referred to the Superintendent. Thus under that regulation suspension for more that three days requires the action of two officials--the principal and the Superintendent.

The defendants contend that for transfer students no referral to the superintendent is required. They would instead vest the principal with complete authority to impose whatever disciplinary sanctions he deems suitable, including the permanent exclusion of a child from his school by the expedient of a forced transfer.*

Third, there is imposed on transfer students a different and more stringent sanction than that which is placed on resident students. It appears that the Superintendent may, under Section 215(3), extend the suspension of a resident student beyond three school days.

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*The plaintiffs do not understand the defendants' position to be that the principal may exclude a child from all public schools.

The suspension may not, however, be indefinitely prolonged so as to become permanent; for such a punishmett would require a School Committee hearing under Mass. Ge. Laws c. 76 sec. 17. Jones v. City of Fitchburg, 211 Mass. 66 (1912). This procedure, the defendants claim, is required only where the child in question lives within the district of his own school; transfer students, they say, are subject to the special sanction of permanent banishment by the principal and without a hearing.

Thus the student body at the Taft School is divided into two groups subject to disparate disciplinary standards, sanctions, and procedures. Resident pupils are treated as first-class citizens of their school--they may be permanently barred from attending it only under the procedures of Mass. Gen. L. c. 76 and, since those procedures have not been invoked for thirty years in practice enjoy the right to complete their education in their own school. Their disciplinary infractions are dealt with within the framework of the assumption that they will continue to attend their school and that it is the school's responsibility to provide them with corrective guidance as well as scholastic instruction.

Transfer students, on the other hand, are second-class citizens--they run the continual risk of banishment from their own school. Their probabion is endless; though they may attend Taft and the Taft Annex for years, as the plaintiff Lois Owens,has done, they are never allowed to belong to their own school. At any moment the edict may issue by which they are sent away from their schoolmates.

This policy, under which one segment of the student body is made to live under constant threat of expulsion, bears no retional relationship to any reasonable purpose. The importation into the field of student discipline of a classification (residence) properly pertaining to the policy of maintaining neighborhood schools is unjustifiable; where a child lives has nothing to do with whether he is a fit candidate for a particular form of discipline. The purpose of any disciplinary regulation--the maintenance of order at school and the correction of individual behavior problems--is unrelated to the geographical classification according to which the defendants claim the right to apportion disciplinary sanctions. The only reason which has become apparent for treating transfer students differently is the apparent conviction of the defendants that they do not belong in the school, are there on sufferance, and can never achieve equality with its "rightful" citizens.

Such classifications deny the equal protection of the laws in violation of the Fourteenth Amendaent to the Constitution of the United States whether they derive from the explicit language of a statute, *see e.g.* *McLaughlin* v. *Florida,* 379 U.S. 184 (1964), the practical application of a statue, *Hernandez* v. *Texas*, 347 U.S. 473. 478 (1954), or the action of an individual under color of official authority even where "the particular action... was not authorized by state law," Griffin v. Maryland, 378 U.S. 130, 135 (1964). The test is uniform: the classification in question must be "of some rationality" and "have some relevance to the purpose for which the classification is made," Rinaldi v. Yeager, 384 U.S. 305, 308-08 (1966), Accord, Robertson v. Ott, 284 F. Supp. 735, 737 (1968). To repeat, the wholly disciplinary purpose of the policy of forced transfers which is at issue in this case bears no rational relationship to the geographical basis on which is is applied.

B. BECAUSE ITS INCIDENCE IS RACIAL, THE DISTINCTION FURTHER VIOLATES THE EQUAL PROTECTION CLAUSE.

When an arbitrary geographical classification runs substantially along racial lines, as is the case at the Taft School, it perpetrates even greater injury and is subject to even closer scritiny, Bolling v. Sharpe, 347 U.S. 497, 499 (1954). In a school where the transfer students are overwhelmingly black and the resident students overwhelmingly white, the application to transfer students of discriminatory standards of discipline effectively segregates the school internally in at least two ways.

First, it invites the intrusion of racial and racist attitudes into the disciplinary process. It encourages those who would treat black students as pariahs or as congenital disciplinary problems. Moreover, in a school in which they are in a distinct though substantial minority, it saddles black students with the burden of avoiding trouble and perhaps inevitable racial friction; in a situation where over ninety per cent of all black students and less that seven tenths of one per cent of white students are subjected to the defendants' policy, the odds are overwhelming that when similar misconduct on the part of both black and white students occurs the blacks will incur the heavier retribution.

Second, the policy stigmatizees black schools, black neighborhoods, and inevitably blacks themselves as inferior and undesirable. It treats the ghetto schools in the students' own districts, from which they may have sought transfer for a variety of reasons, as penal institutions banishment to which is the severest sanction within the principal's power. The circle of racial discrimination is complete: the students, having had impressed upon him at the outset that the "privilege" of attendance at the white school is conditioned on his accepting second-class status there, is constantly reminded by the threat of expulsion (and the periodic actual expulsion of his fellows) that, should he violate the peculiar standards of conduct laid down for his class, he will be sent back to the black school. That school is of course no better equipped than the white school to deal with the child and his problems; it is simply a convenient limbo to which certain children may be banished when the school of their choice no longer chooses to have them.

That the words "black" and "white" may not be used in describing to the students their respective estates is of no importance; the racial incidence of the double disciplinary standard is perfectly plain to them. It is as true of such students as it was of the plaintiffs in Brown v. Board of Education, 347 U.S. 483 (1954), that such a separation "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," id. at 494. In the fifteen years since Brown we have learned much about not only the feelings of inferiority, but also the crippling anger and resentment, that such discrimination can produce.

The figure bears repeating: the policy of the defendants, ostensibly geographical in incidence, applies to more than ninety per cent of the black students at the Taft Junior High School and to only three of its more than 400 white students. Whether it can be said that such segregation is purposefully racial in conception, or whether it is merely the inevitable result of the application in an urban context of a spurious geographical distinction, the Constitution forbids it.

The maintenance of racially discriminatory standards within an institution is of course as repugnant to the Equal Protection Clause as would be the application of such standards to two different schools. See, e.g. McLaurin V. Oklahoma State Regents, 339 U.S. 637 (1950), where even before Brown V. Board of Education, supra, it was held that a black student at a predominantly white graduate school could not be forced to sit, work, and eat apart. And the peculiarly compelling considerations which require the striking down of even a colorably rational policy where it in fact results in discrimination in the public schools have been well reviewed in the extensive and well-documented opinion rendered in the recent case of Hobson v. Hansen, 269 F. Supp. 401, 508 (D. D.C. 1967):

> If the situation were one involving racial imbalance but in some facility other than the public schools, or unequal educational opportunity but without any Negro or poverty aspects (e.g., unequal schools all within an economically homogeneous white suburb), it might be pardonable to uphold the practice on a minimal showing of rational basis. But the fusion of these two elements in *de facto* segregation in the public schools ireesistibly calls for additional justification. What supports this call is our horror at inflicting any further injury on the Negro, the degree to which the poor and the Negro must rely on the public schools in rescuing themselves from their depressed cultural and economic condition, and also our common need for the schools to serve as the public agency for neutralizing and normalizing race relations in this country. With these interests at stake, the court must ask whether the virtues stemming from the...policy...are compelling or adequate justification for the considerable evils of *de facto* segregation which adherence to this policy breeds.

Hobson v. *Hansen*, *supra*, noted that the policy (neighborhood schools) with which it was dealing was "not 'devoid of rationality,'" *ibid*., quoting *Blocker* v. *Board of Education*, 226 F. Supp. 208 (E.D.N.Y. 1964). Nevertheless, because of the considerations discussed in the quoted passage, the *Hobson* court struck the neighborhood school policy down. The policy at issue in this case discriminates as truly as did that involved in Hobson; by contrast with the neighborhood school policy itself, however, the policy of neighborhood discipline within a single school has no rational basis at all. Viewed as either a geographical or a racial distinction, it cannot be justified; and this Court is respectfully urged to hold that the policy's patently discriminatory denial of the equal protection of the laws to the plaintiffs and their schoolmates violates the Fourteenth Amendment to the Constitution of the United States.

THE PLAINTIFFS ARE ENTITLED TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS EVEN IF OPEN ENROLLMENT IS CHARACTERIZED AS A PRIVILEGE

The notion that a governmental body may somehow avoid the limitations of the Due Process and Equal Protection clauses of the United States Constitution by labeling the benefit it accords a "privilege" is an anachronism. As Judge Fuhy has stated,in now classic language:

> One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law. Homer v. Richmond, 292 F. 2d 719, 722 (D.C. Cir. 1961)

In almost every area involving the distribution of Government "largess" it has been held that Due Process and Equal Protection set the outer limits of legitimate Governmental action:

A. PUBLIC EMPLOYMENT

Numerous Supreme Court cases have held that Government is limited in both the manner and reasons for which it may withhold the benefit of public employment. In Wiemen v. Updegraff,344 U.S. 183, 1 2 (1952 the court stated:

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary.

Fifteen years later the court reiterated its earlier pronouncement when it stated in Keyishian v. Board of Regents, 385 U.S. 589, 605 (1967):

> The theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable has been uniformly rejected.

See. Pickering v. Board of Education, 88 Sup. Ct. Rptr. 1731, (1968); Whitehall v. Elkins, 88 Sup. Ct. Rptr. 184 (1967); Cramp v. Board of Higher Education, 368 U.S. 278 (1961); Shelton v. Tucker, 364 U.S. 479 (1960); Johnson v. Branch, 364 F. 2d 177 (4th Cir., 1966); Board of Trustees of Arkansas A & M College v. Davis, 396 F. 2d 730 (8th Cir., 1968); Birnbaum v. Trussel, 371 F. 2d 672 (dd Cir., 1966);' Parker v. Lester, 227 F. 2d 708 (9th Cir., 1955). cf. Greene v. McElroy, 360 U.S. 474 (1959).

B. PUBLIC HOUSING

As in the case of public employment, it is now clear that a public housing tenant is protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. In Rudder v. United States, 226 F. 2d 51, 53 (D.C. Cir., 1955), for example the court stated:

> The Government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process.

Numerous state courts have reiterated a similar position. in Lawson v. Housing Authority, 270 Wisc. 269, 275, 70 N.W. 2d 605, 608 (1955), the court held:

> If a precedent should be established that any governmental agency whose regulation is attacked by court action can successfully defend such an action on the ground thet plaintiff is being deprived thereby only of a privilege, and not a vested right, there is extreme danger that the liberties of ny minority group in our population, large or small, might be swept away without the power of the courts to afford any protection.

See, Chicago Housing Authority v. Blackman, 4 Ill. 2d 319, 321, 122 N.E. 2d 522, 524 (1954); Housing Authority v. Cordova, 130 Cal. App. 2d 883, 886, 279 P. 2d 215, 216 (1955), cert. denied 350 U.S. 969 (1956). cf. Thorpe v. Housing Auth. of Durham, 386 U.S. 670 (1967). Holmes v. New york Housing Authority, 398 F. 2e 262 (2d Cir., 1968).

C. GOVERNMENT LICENSE

In numerous contexts it has been held that a Governmental body may not deny a license inconsistently with the Due Process and Equal Protection Clauses of the United States Constitution. In Gonzales v. Freeman, 334 F. 2d 570 (D.C. Cir., 1964) a corporation was barred from doing business with the Comodity Credit Corp. The court held:

> ... to say there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such right; but that cannot mean that the government can act arbitrarily either substantively or procedurally..." id. at 574.

See, Hornsby v. Allen, 326 F. 2d 605 (5th Cir., 1964) (liquor license); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (practice of law); Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1927) (practice as an accountant); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (practice of law).

D. SOCIAL SECURITY

Social Security benefits were traditionally regarded as a benefit upon which the government could place any condition. The Supreme Court eliminated this notion in Sherbert v. Verner, 374 U.S. 398, 404 (1963), when it stated:

> It is too late in the day to doubt that liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

E. WELFARE *

The last bastion of the right-piivilege distinction has been in the area of public welfare. Numerous recent cases which have held the one year welfare residency requirement unconstitutional have discarded the right-privilege distinction. This court, in Robertson v. Ott, 284 F. Supp. 735 (D. Mass., 1968), summarily noted:

> Defendants submit in their brief that "no individual has a constitutionally protected right to AFDC or any other kind of welfare payments." Although the court may agree, it does not follow that a state may arbitrarily discriminate in making gratuitous welfare payments. cf. Sherbert v. Verner, 1963, 374 U.S. 398, 404, 83 Sup. Ct. 1790, 10 L. Ed. 2d 965, Id. at 373

In Smith v. Reynolds, 277 F. Supp. 65, 67 (E.D. Penn. 1967), probable jurisdiction noted, 390 U.S. 940 (1968), the court similarly stated:

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*See also Goldberg v. Kelly, 38 U.S.L.W. 4223, March 23, 1970

> There is of course, no constitutional right to receive public welfare any more than there is a constitutional right to public education or even police protection. However, if the state chooses to provide such public benefits, privileges, and prerogatives, it cannot arbitrarily exclude a segment of the resident population from their enjoyment.

See. Denny v. Health and Social Services Board, 285 F. Supp. 526 (E.D. Wisc. 1968); Harrel v. Tobriner, 279 F. Supp. 22 (D.D.C. 1967), probable jurisdiction noted, 390 U.S. 940 (1968); Ramos v. Health and Social Services Board, 276 F. Supp. 474 (E.D. Wisc. 1967), Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967), probable jurisdiction noted, 389 U.S. 1032 (1968); Green v. Dept. of Public Welfare, 270 F. SUpp. 173 (D. Del. 1967). See also, Kelly v. Wyman, F. Supp. (68 Civ. 864 S.D.N.Y. November 26, 1968) in which a three judge court held that welfare recipients are entitled to a hearing before their benefits are terminated.

F ~~E~~. PUBLIC SCHOOL STUDENTS

The right-privilege distinction has also been abandoned when the question of disciplining public school students is involved. In Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir., 1961), the court stated:

> Whenever a governmental body acts so as to injure an individual, the Constitution requires thet the act be consonant with due process of law. Id at 155.
>
> ...the state cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process. Id at 156.

See, Woods v. Wright, 334 F. 2d 369 (5th Cir. 1961); Knight v. State Board of Education, 200 F. Supp. 174 (N.D. Tenn. 1961); Due v. Florida A. & M University, 233 F. Supp. 396 (N.D. Fla. 1963); Estaban v. Central Missouri State College, 277 F. Supp. 649(W.D. Mo. 1967)

Woody v. Burns, 188 So. 2d 56 (Fla. 1966); Goldberg v. Regents of University of California, 57 Cal. Rptr. 2d 463 (1967); Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (1967). See also, Brunside v. Byars, 363 F. 2d 744 (5th Cir. 1966).

One reason for the relatively recent discard of the right-privilege distinction is based upon the fact that the distribution of Governmental benefits and services has grown tremendously in the last two decades. Largely because of this growth, courts have realized that fundamental constitutional protections must extend to all relations between a citizen and his government. Moreover, those old cases which discussed a government's obligations in terms of rights and privileges are analytically unsound. Due Process and Equal Protection are such fundamental rights that they cannot be made to depend upon labels. The mandate of the Fourteenth Amendment is that Government must act fairly in its relations with its citizens. Fairness must always depend upon the nature of the public interest and the private interest involved, and the reasonableness of the Governmental action. The most fundamental constitutional rights of Due Process and Equal Protection certainly cannot depend upon semantics. See Van Alstyne, The Demise of the Right-Priveleqe Distinction in Constitutional Law. 81 Harv. L. Rev. 1439 (1968); Reich, The New Property, 73 Yale L.J. 733 (1964); Note Unconstitutional Conditions, 73 Harv. L. Rev. 1595 (1960).

THE PLAINTIFFS HAVE BEEN DENIED THEIR RIGHT TO PUBLIC EDUCATION WITHOUT A HEARING IN VIOLATION OF THEIR RIGHTS TO PROCEDURAL DUE PROCESS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The importance of the private interest in public education has been emphasized by the Supreme Court in numerous contexts. In Brown v. Board of Education, 347 U.S. 483 (1954), the Court reaffirmed what is now a universally accepted point of view:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultured values,in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. 374 U.S. at 493.

Cf. Griffin v. County School Board of Prince Edward County, Va., 377 U.S. 218 (1964))

Relying upon Brown, the Fifth Circuit identified the private interest in attending a particular state college when it stated:

> The precise nature of the private interest involved in this case is the right to remain at a public institution of higher learning at which the plaintiffs were students in good standing....It is an interest of extremely great value. Dixon v. Alabama State Board of Education, 294, F. 2d 150, 157, (19610, cert. denied 368 U.S. 930 (1961).

The Commonwealth of Massachusetts, through several statutory and constitutional provisions, has also affirmed the importance of the right ot public education in this society. Mass. Gen. Laws Chapter 76 § 5 provides:

> Every child shall have the right to attend the public schools fo the town where he actually resides.

Mass. Gen. Laws Chpater 71, Sec 34 provides:

> Every city and town shall annually provide an amount of money sufficient for the support of the public schools.

Mass. Constitution pt. 2 Chapter 5 Art. 3, Sec 2 provides that it is the duty of legislators and magistrates to support and promote the public schools.

Having established the right to a public education, the Massachusetts General Court has provided a tort remedy if a school committee wrongfully excludes or refuses to admit a student to a public school. Mass. Gen. Laws Chapter 76, Sec 16. Evidence that a student has been excluded from the public schools without a hearing establishes a prima facie case of wrongful exclusion. Carr v. Inhabitant of Town of Dighton, 229 Mass. 304, 118 N.E. 525 (1918); Bishop v. Inhabitants of Rolley, 165 Mass. 460, 43 N.E. 191 (1896).

The statutory right to a hearing before a student is permanently excluded from the public schools is established by Mass. Gen. Laws Chapter 76 17 which provides:

> A school committee shall not permanently exclude a pupil from the public schools for alleged misconduct without first giving him and his parent or guardian an opportunity to be heard.

The constitutional right to a hearing before a student is dismissed from a public school is well established. In the leading case of Dixon v. Alabama State Board of Education, 294 F. 2d. 150 (5th Cir., 1961), cert. denied 368 U.S. 930 (1961), the court invalidated expulsions of college students without any notice or opportunity to appear at a hearing. In doing so, the court applied long-established criteria of fundamental fairness within the general contest of the Fourteenth Amendment to the Constitution of the United States. Thc Dixon court stated:

> Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law. The minimum procedural requirements necessary to satisfy due process depends upon the circumstances and the interests of the parties involved. 294 F. 2d. 150 at 155.

Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951); Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961).

As Professor Seavey wrote, in commenting upon what he described as a shocking example of according a school student far less procedural protection than a pickpocket:

> Although the formalities of a trial in a law court are not necessary, and although the exigencies of school or college life may require the suspension of one reasonably thought to have violated disciplinary rules, it seems fairly clear that a student should not have the burden of proving himself innocent. The fiduciary obligation of a school to its students not only should prevent it from seeking to hide the source of its information, but demands that it afford the student every means of rehabilitation. If it has not done so, this opportunity should be given by the courts. Warren Seavery, Dismissal of Students: "Due Process", 70 Harv. L. R. 1407, 1410.

On the general question of due process requirements whenever deprivation of government-created rights is threatened see Reich, "The New Property", 73 Yale L.J. 733 (1964).

The court in Dixon, supra, elaborated at some length to flesh out its insistence upon due process whenever the right to public education is at stake. The court described the "minimum procedural requirements" as follows:

> They should, we think, comply with the following standards. The notice should contain a statement of the specific charges and grounds which, if proved, would justify expulsion under the regulations of the Board of Education. The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires something more than an informal interview with an administrative authority as opposed to a failure to meet the scholastic standards of the college, depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the Administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved.

It is important to note that Dixon has been followed in suspension cases as well as expulsion cases, Knight v. State Board of Education, 200 F. Supp. 174 (M.D. Tenn. 1961). In Knight college students were suspended subject to conditional reinstatement when and if convictions for disorderly conduct were reversed. But even there, where the students had in fact alread been convicted of a crime, the court refused to tolerate action so drastic as suspension before a hearing had been held. The court established that the students "were deprived of a valuable right or interest" by suspension from college. The court added:

> It required no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens. Indefinite suspension pending the appeal of the Mississippi convictions...might well be for practical purposes the equivalent of outright expulsion. 200 F. Supp. at 178.

The court concluded that due process required that a hearing be had:

> the rudiments of fair paly and the requirement of due process vested in the plaintiff's right ot be afforded an opportunity to present their side of the case before such drastic disciplinary action was invoked...Ibid.

Thus, it is clear that even in a suspension case, due process would require a hearing. But the due process conclusion is that much more inescapable here because plaintiffs were told by the school officials they would not ever be re-admitted to the Taft Junior High School.

The Dixon rationale has also been applied to high school cases. In Woods v. Wright, 334 F. 2d. (5th Cir., 1964), the Fifth Circuit refused to permit suspension of a high school student even pending hearing where he had been suspended for violation of a city ordinance. The court recognized the irreparable in ury each day of suspension entailed.

Relying on Dixon, a federal district court in New York recently stated: "Fundamental fairness dictates that a student cannot be expelled from a public educational institution without notice and hearing...Arbitrary expulsions and suspensions from the public schools are also constitutionally repugnent on due process grounds.: Madera v. Board of Education of the City of New York, 267, F. Supp. 356 (S.D.N.Y., 1967).[1]

The principles of Dixon have also been adopted in the recent New York case, Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (1967). In that case the court held that the decision of the Board of Education to bar a high school student from taking the State's regents examination (including college and scholarship qualifications tests) without a prior hearing was a violation of Due Process.

Other recent cases affirming the principle of Dixon include[V] Esteban v. Central Missouri State College, 277 F. Supp.

649 (W.D. Mo. 1967); Due v. Florida A & M University, 233 F. Supp. 396 (N.D. Fla. 1963); Woody v. Burns, 188 So. 2d 56 (Fla. 1966); and Goldberg v. Regents of University of California, 57 Cal. Rptr. 2d 463 (1967). See also, Note - "Developments in the Law of Academic Freedom", 81 Harvard L. Rev. 1045, 1134-42 (1968). Note, "Student Rights and Campus Rules, " 54 Cal. L. Rev. 1 (1966); Van Alstyne, Student Academic Freedom and the Rule Making Powers of Public Universities: Some Constitutional Considerations, 2 Law in Transition Q.1 (1965); Note, School Expulsions and Due Process, 14 Kan. L. Rev. 108 (1965); Note, School Expulsions and Due Process, 1 Indiana Legal Forum 413 (Spring 1968).

The notion that school officials must accord students a hearing prior to exclusion from a public school is merely the application of general principles of fundamental fairness as developed in analagous areas. In addition to school cases such as Dixon, it has been held that the government may not terminate important benefits before offering a hearing. Willner v. committee on Character and Fitness, 373 U.S. 96 (1963) (right to practice law); Schware v. Board of Bar Examiners, 353, U.S. 232 (1957) (right to practice law); Goldsmith v. Board of Tax Appeals 270 U.S. 117 (1927) (right to practice as an accountant); Gonzales v. Freeman, 334 F. 2d. 570 (D.C. Cir. 1964) (right to enter into government contracts); Hornsby v. Allen, 326 F. 2d 605 (5th Cir. 1964) (right to a liquor license); Kelly v. Wyman, F. Supp. - (S.D.N.Y. 1968) (right to welfare benefits - opinion is attached in appendix); Birnbaum v. Trussel, 371 F. 2d 672 (2d Cir. 1966) (right to employment at a state hospital); *Board of Trustees of Arkansas A & M College v. Davis*, 396 F. 2d 730 (7th Cir. 1968 (right to teach at a state college).

The process due the plaintiffs in the instant case was a fair heaing before they were dismissed from the Taft School Their interest in remaining at the Taft and not to be discharged for misconduct, is substantial. First, the interruption of their education during the middle of the school year would have severe educational, psychological, and social effects. Even if another school were made availabe to them, they would have to undergo the tramatic adjustment to new teachers, new curriculum, new friends, etc. Secondly, the psychological and educational impact of a discharge for misconduct is impossible to assess, but there is no question that it would have a substantial effect.

The private interest in a hearing to contest the serious allegations of misconduct significantly counterbalances any legitimate public interest in summary discharge. Indeed, it is difficult to identify any legitimate public interest served by Summary discharge. Moreover, the mandate of Mass. Gen. Laws chapter 71, Sec. 37C, to alleviate racial imbalance in the public schools, should require a predominantly white school to establish fair procedures to carefully ascertain the facts before discharging an out-of-district black student.

in this case it is clear that plaintiffs were not accorded a hearing prior to their dismissal. The plaintiffs were never given notice of specific charges of misconduct, never had an opportunity to present witnesses in their own behalf, never had an opportunity to cross-examine witnesses, and never had an adult represent their interests before the decision to discharge them was finalized on January 23, 1969.

Footnote 1 - The holding in Madera, supra, that a pupil could not be deprived of the right to counsel at a suspension, hearing was reversed in *Madera v. Board of Education*, 386 F 2d 778 (2d. Cr. 1967). The appellate decision did not repudiate *Dixon*, however, Rather it found the proceeding in *Madera*, *supra*, to be factually different and distinguished.

RELIANCE ON "CONDUCT" AS THE STANDARD FOR THE PERMANENT EXCLUSION OF A STUDENT FROM A PUBLIC SCHOOL VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The defendants assert that the "conduct" of each of the plaintiffs is the ground for withdrawing her "privilege to attend the Taft Junior High School under the open enrollment policy. The defendants further rely solely on "conduct" as the standard for withdrawing permanently the privilege of out-of district attendance which, it is contended, is a matter confided exclusively to the principal's discretion without any right to notice of the charges, a hearing, confrontation of the witnesses, or appeal. "Attitude" is an integral part of the "conduct" standard, according to the defendant Devlin, and bad "attitude" justifies the dismissal of students attending the Taft School under the open enrollment policy.

The plaintiffs maintain that imposition of such a severe disciplinary penalty as permanent exclusion from school solely by reference to so vague a standard as "conduct" violates the principle of fundamental fairness guaranteed by the Due Process Clause of the Fourteenth Amendment. More specifically, the plaintiffs contend that the standard of "conduct":

A) is void for vagueness in that it fails to put students on notice of what behavior constitutes sufficient grounds for permanent exclusioin;

B) unconstitutionally vests an adjudicatory official with unfettered discretion;

C) offends due process of the law in that its vagueness effectively deprives a student threatened with permanent exclusion of the opportunity to make a defense;

D) is overbooad and impermissibly restrains the exercise of the rights of free speech and association guaranteed by the First Amendment.

A. THE "CONDUCT" STANDARD IS VOID FOR VAGUENESS

It has long been recognized that criminal statutes may be held unconstitutional under the void for vagueness doctrine. See, e.g., Lanzette v. New Jersey, 306 U.S. 451 (1939) (voiding a statue making it a crime to be a "gangster"). In Connally v. General Construction Co., 269 U.S. 385, 391 (1929) the Supreme Court set forth both the reasons underlying the void for vagueness doctrine and the standard by which statutes were to be measured:

> That the terms of a penal statue creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary methods of fair play and the settled rules of law. And a statue which either forbids or requires the doing of an act in terms so vague that men of normal intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

The Connally Court further noted that constitutional infirmity was avoided by statues using words having either "a technical or other specific meaning well enough known to enable those within their reach to correctly apply them" or "a well-settled common law meaning". Ibid.

While the void for vagueness doctrine originates and finds its primary application in the field of criminal law, it has been held applicable in other areas as well. For, as the Supreme Court stated in *Small Company v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925):

> The ground or principle of the decisions was not suchas to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all.

See also, *Champlin Refining C. v. Corporation Commissioner* of Oklahoma, 286 U.S. 210, 243 (1932).

Laws inhibiting the exercise of First Amendment rights have frequently been set aside for vagueness. *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961), for example, declared unconstitutional a statue requiring public school teachers to sign a loyalty oath as a condition to continued employment. See also, *Baggett v. Bullitt*, 377 U.S. 360 (1964); *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958). Significantly, the Cramp Court accepted the appellant's allegations that he had not engaged in the conduct proscribed by the statue and loyalty oath and had no fear of a possible perjury conviction should he sign the oath. The Court apparently considered the possible discharge from employment as sufficiently "penal" to render the statute unconstitutionally vague.

In recent years the vagueness doctrine - and its corollary, the requirement of ascertainable standards- has been applied in areas of the civil law not involving First Amendment rights. It has been held that the denial of an application for a liquor license involves an adjudicative process and that the applicant must, inter alia, be afforded the...."opportunity to know, through reasonable regulations promulgated by the board of objective standards which had to be met to obtain a license." Hornsby v. Allen, 326 F. 2d 605, 610; reh. den. 330 F. 2d 55 (5th Cir. 1964); Barnes v. Merritt, 376 F. 2d 8 (5th Cir. 1967).

Gonzalez v. Freeman, 334 F. 2d 570, 579 (D.C. Cir. 1964) held the Secretary of Agriculture could not bar dealings with the Commodity Credit Corporation absent inter alia, "regulations establishing standards and procedures." (The Court avoided decision of the constitutional question be interpreting the relevent statute in conjunction with the Administrative Procedure Act to require standards, notice of the charges, and a hearing.) See also, American Airlines v. C.A.B., 359 F. 2d 624 (D.C. Cir. 1966); Overseas Media Corp. v. McNamara, 385 F. 2d 308 (D.C. Cir. 1967).

The only case directly in point is Soglin v. Kaufman, decided December 13, 1968 by the U.S. District Court for the Western District of Wisconsin (C.A. No. 67-C-141). (A copy of the opinion is reproduced in the appendix.). The court held "... that a regime in which the term "misconduct" serves as the sole standard violates the due process clause of the Fourteenth Amendment by reason of its vagueness, or, in the alternative, violates the First Amendment as embodied in the Fourteenth by reason of its vagueness and overbreadth." Id at 15-16.

The decision in Soglin was limited to disciplinary action involving expulsion or suspension for any significant period.

Id at 16. In reaching his decision Judge Doyle took judicial notice of the fact that extended suspension or expulsion"... may e well be, and often is in fact, a more severe sanction than a monetary fine or a relatively brief confinement imposed by a court in a criminal proceeding." *Id* at 12.

"Conduct" is no more amenable to precise definition than "misconduct". Certainly it is necessary for the public schools to possess a panoply of disciplinary tools which may be used summarily to maintain order among young children. But is It not necessary - and even educationally destructive - to impose severe sanctions having a permanent impact on a student's future life and education without reference to meaningful established criteria and absent any minimal procedural safeguards.

It is possible to develop student behaviour standards for the purposes of suspension, expulsion, or involuntary transfer which are not phrased "... in terms so vague that men of normal intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Connally v. General Construction Co.*, *supra*. This principle is recognized in a statement by the American Association of University Professors:

> The disciplinary powers of educational institutions are inherent in their responsibility to protect their educational purpose....In developing responsible student conduct, disciplinary proceedings play a role substantially secondary to counseling, guidance, admonition, and example. In the exceptional circumstances when these preferred means fail to resolve problems of student conduct, proper procedural safeguards should be observed to protect the student from

> the unfair imposition of serious penalties. The following are recommended as proper safeguards in such proceeds. [footnote omitted]
>
> A. Notice of Standards of Conduct Expected of Students. Disciplinary proceedings should be instituted only for violation of standards of conduct defined in advance and published through such means as a student handbook or a generally available body of university regulations. Offenses should be as clearly defined as possible, and such vague phaases as "undesirable conduct" or "conduct injurious to the best interests of the institution" should be avoided. Conceptions of misconduct particular to the institution need clear and explicit definition.

51 A.A.U.P. Bull. 447 (1965), reprinted in Emerson et al, Political & Civil Rights in the United States, 1042, 1045 (3d ed. 1967).

The plaintiffs request that their discharge from the Taft School be set aside since it was based upon a standard which was unconstitutionally vague. Merely providing the plaintiffs with the hearing required by due process of law is, given the standard which would be applied in such a hearing, insufficient relief because "well intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law". Baggett v. Bullitt, supra at 370 (1964).

B. THE "CONDUCT" STANDARD VESTS AN ADJUDICATORY OFFICIAL WITH UNFETTERED DISCRETION IN VIOLATION OF THE DUE PROCESS CLAUSE

The Supreme Court early dispelled the notion that merely because the exercise of discretion is often essential to govern, it may be exercised without reference to any objective standards. The Court declared unconstitutional a municipal ordinance regulating laundries, stating "the power given to them [the responsible

officials] is not confied to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and ackowledges neither guidance nor restraint."
Yick W. v. Hopkins, 118 U.S. 356, 366-367 (1886).

The Court noted that the existence of such power was anathema in a democratic society:

> When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the plan and action of purely arbitrary power ...For, the very idea that one man may be compelled to hold his life, or the means of living, or any other material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. Id at 369-370.

The need for "ascertainable standards", Hornsby v. Allen, supra at 612; cf., Baggett v. Bullitt, supra at 372, to govern decision-making by administrative officials is clear: the operation of "absolute and uncontrolled discretion" is an "intolerable invitation to abuse" Holmes v. New York City Housing Authority, 398 F. 2d 262, 265 (2d Cir. 1968) (requiring an objective method for selection of public housing tenants), "a]nd experience teaches that prosecutors too are human", Cramp v. Board of Public Instruction, supra at 287; Baggett v. Bullitt, supra. Accordingly, actions taken by administrative officials without reference to ascertainable standards embodied in rules or regulations have been declared invalid. Holmes, supra; Hornsby v. Allen, supra; Barnes v. Merritt, supra; Gonzalea v. Freeman, supra.

The open enrollment policy is a part of the Boston School

Committee's plan (required by the Racial Imbalance Act, Mass. Gen. Law. c. 71 Sec. 37D) to alleviate racial segregation in the Boston public schools and to provide quality education to ghetto children. The need for such a policy arises from the effects of past racial prejudice. It would ind ed be "blinking reality", Cramp, supra at 286, not to acknowledge the continued existence of racial prejudice in American society and the difficulty of discerning what decisions are racially motivated. Moreover, one cannot ignore the fact that the Racial Imbalance Act has met resistance in Boston. See, School Committee of Boston v. Board of Education, 352 Mass. 693, 227, N.E. 2d 729, appeal dismissed, 389 U.S. 572 (1967).

The defendants assert that a principal has the power to adjudicate the right of students to remain in his school under the open enrollment policy. This power, they assert, may be exercised without reference to ascertainable standards to guide and limit the principal's exercise of his discretion.

The arbitrary or capricious act of a principal in dismissing a student from his school involves the imposition of a severe sanction. It may summarily destroy the aspirations of the plaintif s, their parents, and others like them, as well as defeat the legislative purpose embodied in Mass. Gen. Law c. 71 sec. 37C, 37D. It is, therefore, imperative that the defendants establish standards to limit the principal's exercise of discretion to legitimate prrposes and to provide a basis for review of such decisions. See, Bishop v. Inhabitants of Rowley, 165 Mass. 460, 43 N.E. 191 (1896).

C. THE LACK OF A STANDARD DEPRIVES THE PLAINTIFFS OF AN OPPORTUNITY TO MAKE A DEFENSE

The plaintiffs are asked to adhere to a standard of "conduct". This term is susceptible of such vagaries of interpretation and application that it is in reality no standard at all. The plaintiffs have, at most, been charged with having "escorted" students from another school into the Taft School or with having a "disruptive attitude". In addition, defendants have expressed an interest in organizations outside the school to which the plaintiffs might belong or support.

The vagueness of the standard, the charges, and their possible ramifications deprive the defendants of the opportunity to rebut the claims of misconduct. See. geo., Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161-173 (1951) (concurring opinion). In reality, the defendants have impermissibly shifted to the defendants an impossible burden of proof: the establishment of "good" conduct and "good" attitude. Cf., Speiser v. Randall, 357 U.S. 513, 526 (1958); Soglin v. Kaufman, (D.C. W.D. Wis. 1968) (C.A. No. 67-C-141)

D. THE STANDARD OF "CONDUCT" IS OVERBROAD AND UNCONSTITUTIONALLY CHILLS THEIR FIRST AMENDMENT RIGHTS

Undeniably, the behaviours of students within the public schools is an appropriate subject for regulation by the Boston School Committee. And the power to regulate clearly imples the power to impose penalties for the violation of school disciplinary rules. The regulatory power not unrestricted, however, as the Supreme Court noted in Shelton v. Tucker, 364 U.S. 479, 488,

> ...even though the govennmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

Overbreadth is inherent in the vagueness of "conduct" as a disciplinary standard. A standard which, in its application, may include "attitude" clearly "...creates a 'danger zone' within which protected expression may be inhibited." Dombrowski v. Pfister, 380 U.S. 479, 494 (1965). "A rule against 'misconduct' is so grossly vague that possible involvement of First Amendment rights cannot be ignored." Soglin v. Kaufman at p. 7 (D.C. W.D. Wis. 1968) (C.A. No. 67-C-141).

The plaintiffs are gour young black girls who are in a distinct racial minority in a school populated and run by a sometimes hostile white majority. Under the defendants' interpretation of the open enrollment policy, the plaintiffs' status as students is far more tenuous and the possible invasion of their First Amendment rights is much more likely than the teachers whom the Supreme Court thought it necessary to protect in such decisions as Baggett v. Bullitt, supra; Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966).

That the disciplinary policy which the defendants have superimposed on the open enrollment policy has a constitutionally impermissible "chilling effect," Dombrowski, supra at 494, on plaintiffs' rights of free expression and association is readily apparent. One need only take notice of the current disputes over community control of the schools, consider the possibility of plaintiffs' advocacy of community control, and examine the difficulty previously encountered by the National Association for the Advancement of Colored People under the guise of legitimate regulation. See, N.A.A.C.P. v. State of Alabama, 357 U.S. 499 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960); N.A.A.C.P. v. Button, 371 U.S. 415 (1963).

It is not open to the defendants to object that the "conduct" standard has not in fact been used to impair the plaintiffs' expression or association: "It is enough that a vague and broad statute lends itself to selective enforcement against unpopular causes." N.A.A.C.P. v. Button, supra at 435. The importance of the values protected by the First Amendment opens to judicial scrutiny the possible application of the regulation in other factual contexts, and it is not necessary that the party raising the issue actually participate in the privileged conduct. Id at 432.

CONCLUSION

On the basis of the facts and authorities set forth above, plaintiffs respectfully submit that this Court should grant the relief requested.

By their Attorneys,

MICHAEL L. ALTMAN
JOHN E. BOWMAN, JR.
Boston Legal Assistance Project

FREDERIC D. DASSORI, JR.
Choate, Hall and Stewart
Boston, Mass.

NOTE: The Owens case was settled by stipulation. The Boston School Committee agreed to set up certain procedural safeguards in disciplinary proceedings. The following excerpt from the new Boston Public Schools "Code of Discipline" reflects the substance of the Owens stipulation.

* * *

III. Procedures for transfers and suspensions.

(1) Initial suspension and conference with parent.

(a) Whenever an administrative head decides to suspend or transfer a pupil for disciplinary reasons, he may suspend the pupil for up to three school days if the pupil is under 16 and up to five school days if the pupil is over 16 years of age. In such cases the administrator shall forthwith request the attendance of such suspended pupil and the parent or guardian of such suspended pupil at his office for the pupose of consultation and adjustment. Within the initial period of suspension the administrative head may reinstate the pupil or, after the conference with the parent or guardian, he may refuse to do so. Within said period he may transfer a pupil with the consent of the pupil and his parent or guardian.

(2) Reference of the matter to the assistant superintendent.

(a) If the pupil is neither reinstated within three school days of his original suspension if he is under 16 or within five school days if he is over 16, nor transferred within said period, then the matter shall be referred in writing by the administrative head to the assistant superintedent for the district in which the school is located. The pupil and his parent or guardian shall be notified in writing by the administrative head of their right of appeal and to a hearing before the assistant superintendent and they shall be given his name, address and telephone number.

(3) Hearing.

Upon request of the pupil so suspended or his parent or guardian, said assistant superintendent shall hold a hearing in the matter which shall be conducted as follows:

(a) Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the facts and issues involved (including a statement of the alleged misconduct and proposed disciplinary action) to afford them reasonable opportunity to prepare and present evidence and argument.

(b) All parties shall have the right to call and examine witnesses to introduce exhibits, to question witnesses who testify and submit rebuttal evidence.

(c) The assistant superintendent is not required to observe the rules of evidence observed by courts, but evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

(d) A student shall have the right to be represented by his parent or guardian and/or counsel if the student so chooses.

(e) The decision of the assistant superintendent shall be based solely upon the evidence presented at the hearing and shall be in writing.

(f) Any party shall, of his own expense, have the right to record or have transcribed the proceeding before the assistant superintendent.

(4) Decision.

The assistant superintendent shall reach a decision in the matter within six school days of the original suspension if the pupil is under 16, or within ten school days of the original suspension if the pupil is over 16. A copy of the decision shall be delivered or mailed to the administrative head, to the pupil and his parent or guardian with notification of their right to request that the superintendent review the decision. In the event that the decision is not made within the requisite period of time, and the delay is not due to failure to appear or other inaction on the part of the pupil or his parent or guardian, the pupil shall be reinstated pending the decision.

(5) Review by superintendent.

The administrative head or the pupil so suspended or his parent or guardian may request that the superintendent review the decision of the asssitant superintendent and, if such a request is made, the superintendent may, if he so elects, grant a hearing in the matter.

(6) Review by School Committee.

If such case is not settled by the superintendent within five additional school days, the administrative head or the pupil so suspended or his parent or guardian may request that the School Committee review the matter and the School Committee may hold a hearing if it so elects.

(7) Temporary reinstatement.

In the event of appeal by the administrative head to the superintendent or the School Committee, pending decision in the matter by the superintendent or the School Committee, the pupil shall be temporarily reinstated.

IV. Procedures for exclusions.

Whenever an administrative head recommends exclusion, the matter is to be decided by the School Committee after a hearing to be held in accordance with the procedures for hearings in Section III.

V. Required reports.

An administrative head is required to report to the superintendent, the associate superintendent at the proper level, the area assistant superintendent for the district in which the school is located, and to the police all cases of assault and/or battery on school personnel.

VI. Restitution.

Following suspension for wilful defacement, damage, or destruction of school property, payment for defacement, damage or destruction shall be demanded. Terms or payment will be established at the discretion of the administrative head.

VII. Teacher and pupil appeals.

(1) Any teacher who is not satisfied with the action taken by the administrative head in a disciplinary case may appeal the decision in writing to the assistant superintendent, associate superintendent, superintendent, and School Committee in proper order.

(2) Any pupil or any parent or guardian of any pupil against whom disciplinary action is taken who believes that such action is unlawful or in violation of these rules may so indicate in writing to the administrative head and the assistant superintendent who shall investigate the matter.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X

DENNIS ANDINO, a minor child, individually and on behalf of all others similarly situated, by his next friend, ANGELINA ANDINO, and

ROBERT BROWN, a minor child, individually and on behalf of all others similarly situated, by his next friend, JULIETTE BROWN,

Plaintiffs,

-against-

BERNARD DONOVAN, as Superintendent of Schools of the Board of Education of the City of New York,

68 Civil Action No. 5029

RICHARD LUBELL, as Assistant Superintendent in Charge of Special Education of the Board of Education of the City of New York,

MARTIN W. FREY, as Assistant District Superintendent of the Board of Education of the City of New York, and

NATHAN JACOBSON, as District Superintendent, District Five, of the Board of Education of the City of New York,

Defendants.
---X

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND PERMANENT INJUNCTION

Respectfully submitted,

HAROLD J. ROTHWAX
JONATHAN A. WEISS, Of Counsel
Attorneys for Plaintiffs
759 Tenth Avenue
New York, New York 10019
Tel. No. 581-2810

* * *

I. THE RIGHT TO A FREE PUBLIC EDUCATION IS GUARANTEED TO THE PLAINTIFFS BY THE EDUCATION LAW OF THE STATE OF NEW YORK, THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE FIRST AMENDMENT, TO THE CONSTITUTION OF THE UNITED STATES.

The right of a child to attend the free public schools is a fundamental liberty protected by the statutes of the State of New York and by the Fourteenth Amendment to the Constitution of the United States. While the local Board of Education is authorized to make rules and regulations necessary for the governing of pupils and teachers (Education Law, McKinney's Consol. Laws, §§2503, 2554) this authority may not be exercised in an arbitrary or capricious manner or in violation of the Constitution. West Virginia v. Barnette, 319 U.S. 624 (1943). The federal courts are empowered, both under their inherent equitable jurisdiction and under the Constitution, to rectify injustices wrought by abusive exercise of the regulatory authority of the Board of Education.

The State of New York recognizes the paramount value of education and makes school attendance compulsory on the part of children in New York City between the ages of six and sixteen. Education Law, McKinney's Consol. Laws §3205(i); New York Constit., §1, Art. XI. The law further requires parents to send their children to school and makes it a criminal offense for parents to fail to do so. Education Law, McKinney's Consol. Laws §3212. In addition to this statutory mandate, the Fourteenth Amendment's concept of liberty guards the rights of school children against unreasonable rules and regulations imposed by school authorities. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the state itself and all of its creatures--Boards of Education not excepted." West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

"Liberty" under the Constitution has traditionally included the right to education. In one of the early education cases, Meyer v. Nebraska, 262 U.S. 390, 399 (a case affirming parents' rights to see that their children are instructed in modern languages), Mr. Justice McReynolds, speaking for the court, defined this right as follows: ". . . Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Emphasis added) If a minor child in this age who lacks substantial means is deprived of the right to a public school education, his opportunities to learn, to make a living, and to engage in the common occupations will be drastically curtailed for the rest of his life. Report of National Advisory Commn. on Civil Disorders (1968), pp. 424-456. The magnitude of this loss to the child prohibits the Board of Education from denying the right to attend school except for the most compelling reasons and in a procedural manner calculated to insure a fair decision with respect to each child.

The Supreme Court of the United States has described the monumental value of the right to a public school education in cogent terms:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both

> demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of education." Brown v. Board of Education, 347 U.S. 483, 493 74 S. Ct. 686, 98 L. Ed. 873 (1954). See also Pierce v. Society of Sisters, 268 U.S. 510.

Plaintiffs' right to a public school education is also protected by the First Amendment to the Constitution. The authorities of Brown, Pierce, and the President's Commission on Civil Disorders, supra, are but a sampling of the vast recognition which has been given to the paramount value of an education. In Lamont v. Postmaster General, 381 U.S. 301 (1965), the Supreme Court enunciated more broadly the First Amendment right to exposure to ideas and learning. In that case Section 305(a) of the Postal Service and Federal Employees Salary Act of 1962, requiring the Postmaster General to detain and deliver only on the addressee's request unsealed foreign mailings of "communist political propaganda," was held unconstitutional. The Court premised its decision on a broad "right to learn" protected by the First Amendment, in reasoning which is applicable to the situation in this case: "The dissemination of ideas can accomplish nothing if otherwise willing addressees [students] are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." 381 U.S. 301, 308 (Mr. Justice Brennan, concurring opinion). Mr. Lamont's marketplace in which to receive ideas was the public mails; Dennis Andino and Robert Brown's marketplace is the public schools. The differences in the marketplaces or the ideas received there are irrelevant; the right to receive them is the same.

* * *

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The Public High School Student's Constitutional Right to a Hearing

by Robert A. Butler, Member of the New York Bar

[Editor's Note: The author is a corporate attorney in New York City. The corporation for which he works makes it possible for its attorneys to participate in legal assistance projects on a released time program. Mr. Butler recently spent a month as a volunteer with the Norwalk-Stamford-Danbury Regional Legal Services Program in Stamford, Connecticut, during which he did much of the research on which this article is based.]

Introduction

The due process clause of the fourteenth amendment is becoming increasingly significant for public school students throughout the country. A growing trend of authority is firmly establishing that due process entitles a public school secondary student to a hearing before he is subjected to severe punishment such as expulsion or suspension for the remainder of the semester or school year. Although the leading case involved a college student rather than a high school student, together with other college cases *(infra)* it established precedents which are currently being applied to secondary school students.

There is little doubt today that a secondary student is entitled to a hearing prior to severe punishment. The real issue now is where the "shadowy" line runs between severe punishment which necessitates a hearing and minor punishment which does not. Certainly, expulsion is severe punishment whereas detaining a student after school is not, but where is the line between them? The line appears to be drawn at approximately ten-day suspension, with the decided cases divided on whether a hearing is required at that point.

Significantly, the courts have also delineated the attributes of the hearing with a fair degree of clarity. For example, the student must be given adequate notice of the hearing and the names of witnesses to be called. The hearing must be unbiased, with the student permitted to present his own defense. There are conflicting views, however, as to whether or not the student is entitled to be represented by counsel or to cross-examine the witnesses against him.

Ground-Breaking Decisions Held That Students in State Colleges Must be Given a Hearing Before Expulsion

The leading case is *Dixon v. Alabama State Board of Education*[1] in which, ten years ago, the Fifth Circuit held that the due process clause of the fourteenth amendment requires that a student be given a hearing before he may be expelled from a state college. The United States Supreme Court has never directly passed on the question, but it did decline its opportunity to review the *Dixon* decision and, indicatively, cited it with approval in its important opinion in *Tinker v. Des Moines Independent Community School District.*[2] (That opinion sets forth the basic liberal rule to be followed in all cases involving the first amendment freedom of expression of students in public schools.) It also cited *Dixon* with approval in *Goldberg v. Kelly*,[3] in which the Court held, analogously, that people on welfare are entitled to a hearing before their benefits may be terminated.

In the *Dixon* case, the plaintiffs were blacks enrolled at the Alabama State College for Negroes in Montgomery, Alabama, who held a sit-in to integrate a luncheon grill in Montgomery. The next day some of the plaintiffs and

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[1] 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

[2] 393 U.S. 503 (1969). The Supreme Court ruled that a student may express his opinions in the public schools, even on controversial subjects, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. The Court upheld the right of junior and senior high school students to wear black armbands to school in protest against the Vietnam War.

[3] 397 U.S. 254, 262-63 (1969).

Student's Constitutional Right to a Hearing

(continued from page 431)

others staged a mass attendance at the trial of one of their fellow students for perjury, after which they marched through Montgomery. The following day, several hundred black students, plaintiffs included, staged mass demonstrations in Montgomery and Tuskegee, and a few days later, the plaintiffs and six hundred other students gathered on the state capitol steps and made speeches and sang hymns. Three days after the demonstration at the state capitol, the state college president wrote to the plaintiffs telling them that they had been expelled. The students were not given a hearing, nor did the president give specific grounds for the expulsions.

In deciding the case, Judge Rives for the Fifth Circuit held that "the minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved."[4] The interests of the state must be balanced against the interests of the students, and Judge Rives concluded that there was no "immediate danger to the public" which would prevent the school from giving the students notice of the charges and the opportunity to be heard in their own defense.[5]

Not to be overruled by a technicality, Judge Rives also flatly rejected the argument that the plaintiffs had waived their right to notice and a hearing before being expelled on account of a state Board of Education regulation which provided that "the college may also at any time decline to continue to accept responsibility for the supervision and service to any student with whom the relationship becomes unpleasant and difficult." It is easy to surmise that, at some point over the years, many other state colleges and universities have issued similar regulations. However, Judge Rives stated that the regulation was insufficiently explicit to indicate an intent on the part of the students to waive notice and a hearing before expulsion, and, even if it was explicit, that "it nonetheless remains true that the state cannot condition the granting of even a privilege upon the reunciation of the constitutional right to procedural due process."[6]

Judge Rives then explained what the notice of charges should be and how the required hearing should be conducted. The notice must contain the "specific charges." While the nature of the hearing should vary depending upon the circumstances, it must be more than an "informal interview," and "both sides" should be heard. The right to cross-examine witnesses is not required, but the student should be given the names of the witnesses against him and a report on their testimony. He should be permitted to present his own defense and witnesses or affidavits in his own behalf. In addition, the circumstances may indicate that the findings should be presented in a report which will be open to the student.[7]

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[4] 294 F.2d at 155.

[5] *Id.* at 157.

[6] *Id.* at 156.

[7] *Id.* at 158-59.

She did so and was told that her son was to be expelled. The whole purpose of the conference was to explain the punishment. Although both boys had been called to the principal's office a few days earlier, neither was advised at that time that disciplinary action would be taken or why their newspaper violated the school regulations.

The federal district court held that this procedure clearly failed to meet the minimum standards of procedural due process. When severe discipline such as expulsion is contemplated, high school students must be given a fair hearing and notice of the charges in advance. The court said first that: "Formal written notice of the charges and of the evidence against him must be provided to the student and his parents or guardian", second, there must be a "formal hearing affording both sides ample opportunity to present their cases by way of witnesses or other evidence"; and third, there can be "imposition of sanctions only on the basis of substantial evidence."[20] Furthermore, the court permanently enjoined the school officials from "expelling or suspending for a substantial period of time secondary school students in the Houston school district who are guilty of any misconduct without compliance with minimal standards of due process."[21]

In *Jackson v. Dorrier,*[22] a Sixth Circuit case, the plaintiffs were two high school boys who let their hair grow very long because they played in a band. The principal warned the boys that their hair was against the rules, but they ignored him and let it get even longer. Finally, the principal held a conference with the two boys and suspended them. He then filled out suspension forms and sent copies to the boys' parents and to the officials of the school system. After that, the principal held conferences with the boys' parents, and an official of the school system also held a conference with the parents and advised them of their right to appeal to the Board of Education. The parents did appeal, and a hearing was held before the Board at which the parents made full statements of their position and also questioned the principal. The Board, however, upheld the suspensions by the principal. The Sixth Circuit denied the boys the right to wear long hair and upheld the procedure of the suspensions because of the conferences which were held and the hearing before the Board of Education. The court said that the two students were "afforded ample opportunity to be heard" and "the procedural and substantive requirements of due process were met by conferences conducted by the school principal and by the hearing before the Board of Education."[23] At another point in the opinion, the court reiterated that there was "adequate compliance with due process standards" since the students were accorded "an adequate hearing before school authorities and the Board of Education."[24]

Tibbs v. Board of Education[25] is the most recent high school expulsion case to come to my attention, and it presents the hardest kind of facts that could face a court in applying the hearing rule. Yet, indicative of the fact that the rule is becoming firmly established, at the behest of Legal Services attorneys the New Jersey court held that the high school students involved could not be expelled without a hearing with proper safeguards. In this case, the court was faced with a group of high school girls who, according to the testimony, had beaten up two other girls who were walking home from school. The two girls were struck with a stick, jumped on and then kicked, after which they reportedly ran, crying, to the guidance office at their school. They were either unable or afraid to identify their attackers, but a number of other students who saw the episode did identify them for the school authorities. However, the school authorities assured those who made the identifications that their names would not be released since there was fear of physical retaliation.

The alleged assailants denied that they were involved, and the local Board of Education held hearings. At the hearings, the Board accepted statements that had been written by the student witnesses, but these statements were unsigned and the witnesses were not identified because of the "terror of retaliation." In fact, the principal testified at the hearing that the mother of one of the accused girls had called him, "threatening the life of one of the prospective witnesses."[26] The Board expelled the girls and they appealed to the Commissioner of Education. The Commissioner held a further hearing and affirmed the expulsions, but the New Jersey Court reversed and set them aside.

The three judges of the appellate division of the superior court who rendered this decision could only agree on a brief per curiam opinion, although they supplemented this with individual concurring opinions. The per curiam opinion gives "failure to produce the accusing witnesses for testimony and cross-examination"[27] as the reason for the decision. However, a fuller rationale is given in the concurring opinion of Judge Conford, who stated that identifying the adverse witnesses and supplying the students with statements or affidavits of the witnesses in advance of the hearing would be "minimally essential" in an "issue over controverted objective conduct" in order to "give the accused a fair opportunity to meet and refute possibly mistaken or unfounded assertions of fact." Moreover, "common experience" establishes that "the right of cross-examination is almost always essential for assurance of an enlightened determination of a contested issue of fact."[28] Thus, the right to a fair hearing with proper safeguards is such a vital personal right that it will be upheld even in a situation where the prospective witnesses are afraid to identify themselves, and students accused of serious wrongdoing may never be severely punished.[29]

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[20] *Id.* at 1346.

[21] *Id.*

[22] 424 F.2d 23 (6th Cir. 1970), *cert. denied,* 400 U.S. 850 (1970).

[23] *Id.* at 217.

[24] *Id.* at 218.

[25] 276 A.2d 165 (Super, Ct. App. Div. N.J. 1971).

[26] *Id.* at 167 (concurring opinion of Conford, J.).

[27] *Id.* at 166.

[28] *Id.* at 169-70 (concurring opinion of Conford, J.).

[29] *Id.* at 171 (concurring opinion of Conford, J.).

The decisions of the Second, Sixth and Eighth Circuits following *Dixon* clearly show agreement that a student enrolled at a state or government-supported college cannot be expelled for misconduct without being apprised of the charges against him and being afforded a fair hearing. In *Wasson v. Trowbridge*,[8] the Second Circuit held that in order to dismiss a cadet from the Merchant Marine Academy, due process requires that "he be given a fair hearing at which he is apprised of the charges against him and permitted a defense."[9] In *Jones v. State Board of Education*,[10] the Sixth Circuit affirmed a district court decision requiring that students be given adequate notice of charges and a fair hearing before expulsion from a state university. The district court stated that the rule "that due process of law requires notice and some opportunity for a hearing before a student at a tax-supported college or university may be expelled for misconduct has now become well established."[11] The United States Supreme Court granted certiorari to consider the free speech issues involved in the *Jones* case, but later dismissed its grant of certiorari as improvidently granted when it learned that the plaintiff was suspended in part for lying at his hearing. Emphasizing the importance of the hearing, Justices Douglas and Brennan dissented from the dismissal of certiorari on the ground that the charges against the plaintiff did not include lying and the plaintiff was "entitled to notice and opportunity to be heard" on that charge.[12]

In *Esteban v. Central Missouri State College*,[13] one of the district courts in the Eighth Circuit held that students suspended for two semesters from a state college should be given a new hearing because they had been permitted to make their explanation to only one of the persons who decided on their suspension. The court also thought that the students may not have received adequate notice of the grounds on which the school proposed to take action. A new hearing was then held, and the suspensions were reaffirmed. The students then instituted a new suit, and in the new suit the district court approved the suspensions and the procedural due process afforded the students. The Eighth Circuit affirmed,[14] and the opinion was written by Judge Blackmun, now Associate Justice of the United States Supreme Court. Blackmun expressly approved the first decision of the district court as well as the second, saying that procedural due process must be afforded "by way of adequate notice, definite charge, and a hearing with opportunity to present one's own side of the case and with all necessary protective measures."[15]

Since the *Dixon* decision, the federal district courts have uniformly held that students in state colleges must not be expelled or suspended indefinitely or for the remainder of a school year for misconduct without notice of the charges and a fair hearing.[16] While almost all of the cases have been in the federal courts, there have been consistent *post-Dixon* decisions in the state courts as well.[17]

Public High School Students Have the Same Constitutional Right to a Hearing as College Students

Expelled high school students have also taken school officials to court, and one can only conclude from reading these cases against the background of the many analogous college student cases that public high school students are clearly entitled to notice of the charges and a fair hearing before they may be expelled from school.

The first high school expulsion case after *Dixon* was *Woods v. Wright*,[18] decided in 1964 by the Fifth Circuit—the same Circuit which had decided *Dixon* three years earlier. The plaintiff in *Woods* was a black girl who participated in a peaceful demonstration against segregation in Birmingham, Alabama in May of 1963. She was arrested under a city ordinance for parading without a license, and, shortly thereafter, her principal suspended her from school for the remainder of the year—without any hearing. The Fifth Circuit reinstated her by reversing the district court's denial of her request for a temporary restraining order. This, however, was a preliminary order, and the Fifth Circuit said that the question whether the suspension without a hearing violated the plaintiff's due process rights was not then properly before it for decision.

In 1969, however, a federal court in Texas issued a clear directive that expulsion of high school students necessitates notice and a hearing. In *Sullivan v. Houston Independent School District*,[19] a public high school principal in Houston expelled two seniors for distributing their own newspaper in which they effectively criticized and ridiculed the principal and others in charge at their school.

Their expulsion took the following course. The high school principal advised one's mother over the telephone that he was being expelled, and this was the first notice to either of his parents that he was in trouble. As to the other, the principal requested his mother to come to his office.

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[8] 382 F.2d 807 (2d Cir. 1967).

[9] *Id.* at 812.

[10] 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31 (1970).

[11] 279 F. Supp. at 198. In the Sixth Circuit, *see also* Norton V. Discipline Comm. of E. Tenn. State Univ., 419 F.2d 195, 200 (6th Cir. 1969), *cert. denied*, 399 U.S. 906 (1970).

[12] 397 U.S. at 36.

[13] 277 F. Supp. 649 (W.D. Mo. 1967).

[14] Esteban v. Central Missouri State College, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

[15] 415 F.2d at 1089.

[16] Knight v. State Board of Education, 200 F. Supp. 174 (M.D. Tenn. 1961); Due v. Florida A. & M. University, 233 F. Supp. 396 (N.D. Fla. 1963); Zanders v. Louisiana State Board of Education, 281 F. Supp. 747 (W.D. La. 1968); Schiff v. Hannah, 282 F. Supp. 381 (W.D. Mich. 1966); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Moore v. Student Affairs Comm. of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968); Scoggin v. Lincoln University, 291 F. Supp. 161 (W.D. Mo. 1968); Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416 (W.D. Wis. 1969); *appeal dismissed as moot*, 420 F.2d 1257 (7th Cir. 1970); French v. Bashful, 303 F. Supp. 1333 (E.D. La. 1969).

[17] Woody v. Burns, 188 So.2d 56 (Dist. Ct. App. Fla. 1966); Goldberg v. Regents of University of California, 57 Cal. Rptr. 463 (Ct. App. 1967).

[18] 334 F.2d 369 (5th Cir. 1964).

[19] 307 F. Supp. 1328 (S.D. Tex. 1969).

In reviewing these important due process precedents with respect to expulsions, however, it should be kept in mind that the due process clause may not be the only basis for establishing the right to a hearing when a high school student is expelled. This right may also be accorded as a matter of state or local statutory law.[30]

The Courts Have Disagreed as to Whether a Hearing is Required for a Ten-Day Suspension from High School

No one should dispute the dictum in the *Sullivan* case *(supra)* that the right to a hearing applies not only to expulsions but also to suspension for a "substantial" period of time.[31] However, one should certainly expect differing opinions as to what should be considered "substantial."

For example, in *Black Students of North Fort Myers Junior-Senior High School, ex rel. Shoemaker v. Williams*,[32] a federal district court in Florida expressed its opinion that a ten-day suspension is for a "substantial" period of time. The high school students had been suspended for ten days under a school board rule which called for automatic suspension of any student who participated in a demonstration or walk-out. This procedure, the court said, could not be justified on the basis that the principal had seen the students engaging in the misconduct for which they were charged and therefore knew that the students were guilty. The reason is that due process "protects the orderly and the disorderly, even as it protects the innocent and the guilty."[33] Due process prevents school officials "from suspending a student for a substantial period of time without first affording the student an adversary hearing." Without qualification, the court concluded that: "A suspension for ten days is a suspension for a substantial period of time."[34]

A contrary decision, however, is *Farrell v. Joel*,[35] in which earlier this year the Second Circuit held that a hearing is not required for a ten-day suspension from high school. The plaintiff was a high school girl in Clinton, Connecticut who participated in a "sit-down" outside the school's administrative offices with about 30 other students in order to protest the suspension of three other students. The principal requested the group to go to classes and to designate leaders. Some of them left, but others refused. Later, the plaintiff and about 300 students gathered in the same place, and the principal called an assembly to prevent the possibility of violence. At the assembly, the plaintiff and others were elected leaders, who met with the principal a few days later and told him that they planned to present the whole matter of the "sit-down" to the Board of Education. The demonstration was discussed during an open meeting of the Board of Education, but the Board then voted in a closed session to suspend the plaintiff and others for 15 school days. This was later reduced to ten days.

The plaintiff argued that she was entitled to a written notice of the charges against her, and a hearing before an impartial official at which she could confront and cross-examine any adverse witness as well as present a defense concerning punishment. The Second Circuit rejected this argument, however. In holding that the plaintiff had not been denied due process, the court noted that the major cases such as *Dixon* in the Fifth Circuit and *Wasson* in the Second Circuit had dealt with severe sanctions such as expulsion rather than with milder discipline such as suspension for a short time. Assuming "arguendo that due process applies when a publicly financed educational institution—whether college or high school—imposes a mild, as well as a severe, penalty upon a student," this only begins the inquiry. For in school discipline cases, the "nature of the sanction affects the validity of the procedure."[36] Expulsion is at one end of the spectrum, and being detained after school at the other. The court said that.

> Expulsion would be at one extreme. Near the end of the other might be a penalty of staying after school one hour for 'unexcused tardiness to class or study hall'; in such an instance, written notice and cross-examination of adverse witnesses would require inappropriate time and effort. Of course, as one approaches the center of the two extremes of major and minor discipline the line becomes shadowy, but the difficulty of drawing it does not eliminate the distinction between the two. Moreover, the general age level of the student group involved might affect determination of the constitutional issue. A demonstration in kindergarten, after all, is not the same as one in college.[37]

The court emphasized that the school rule involved had been well-publicized and that the principal had read it to the demonstrators. The plaintiff admitted that the demonstration disrupted school activity and that she knew she was violating the school rule. On these facts, the court concluded that "no constitutionally-required purpose would have been served by more formal procedures," except perhaps for determination of the penalty, and the procedure as to the penalty was not of "controlling significance." The court emphasized that the plaintiff's actions were "clearly improper and prompt discipline of some sort was justified."[38]

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[30] In Connecticut, for example, a state statute so provides. CONN. GEN. STATS. §10-234 (1957) states that:

> The board of education of any town may expel from school any pupil regardless of age who after a full hearing is found guilty of conduct inimical to the best interests of the school. Written notice of such hearing shall be given to the pupil and his parent or guardian at least five days prior to the date of the hearing. A written report of the action of said board in expelling each such pupil shall be mailed to the state board of education within five days of the effective date of such action.

[31] 307 F. Supp. at 1346.

[32] 317 F. Supp. 1211 (M.D. Fla. 1970).

[33] *Id.* at 1214-15.

[34] *Id.* at 1216. In Banks v. Board of Public Instruction, 314 F. Supp. 285 (S.D. Fla. 1970), the court held that hearings were required in the case of ten-day suspensions from junior high school. However, the United States Supreme Court recently vacated this judgment and remanded the case "so that a fresh decree may be entered from which a timely appeal may be taken to the United States Court of Appeals for the Fifth Circuit if the appellant [the Board] so chooses." 91 S. Ct. 1223 (1971).

[35] 437 F.2d 160 (2d Cir. 1971).

[36] *Id.* at 162.

[37] *Id.* at 162-63.

Nevertheless, the court was also critical of the fact that there was "no clear procedure" by which a student or his parent could either contest a charge that he had violated a rule when the material facts were in dispute or argue against a proposed penalty. Unfairness, the court said, could be avoided by promulgation of "fair and reasonable" procedures for discipline less than expulsion since "this would give those affected a fair opportunity to question whether an alleged violation of a school rule actually occurred and what penalty, if any, would be appropriate."[39] The Second Circuit does not say what these "fair and reasonable procedures" should be, but they would seem to have to incorporate, however informally, some notice of the charge and some opportunity for the student to be heard on his side of the question.

A ten-day suspension of high school students without a hearing was also approved by a federal district court in *Baker v. Downey City Board of Education.*[40] The only procedural consideration that the students received was that the school officials fully discussed the matter with the students' parents after the suspensions were imposed. The court reasoned that if the *temporary* suspension of a high school student could not be accomplished without notice and a hearing, it would be "difficult to maintain" the "discipline and ordered conduct of the educational program and the moral atmosphere required by good educational standards."[41]

These ten-day suspension high school cases are certainly not clear cut precedents. *Farrell* may be distinguishable on the ground that the student involved admitted the conduct that was prohibited, and a hearing would not resolve any factual issues as to what actually happened. However, even if all the facts are undisputed, there should still be a hearing to make the important determination of what penalty should be imposed. Moreover, in the *Black Students* case, a hearing was required to determine guilt or innocence before the ten-day suspensions could be imposed, even though the principal witnessed the misconduct himself and there was probably little doubt about the facts. Furthermore, in trying to determine the overall implications of these cases, one must also take into account that in *Baker* the court appears to have given weight to the post-suspension discussions with the students' parents. While the influence of other factors in these decisions beclouds the split of authority, the fact that there is a split of authority and that other factors are of significance probably means that this is an approximation of that "shadowy line" between mild and severe punishment in the public schools. If this is the case it is highly significant, because one can then say that longer suspensions from high school should clearly require notice and a hearing.

The Hearing Requirement Extends to Other Forms of Severe Punishment in the Public High Schools Besides Expulsion or Lengthy Suspension

Expulsion and suspension for a substantial period are most readily classified as severe punishment, but there are other ways of punishing high school students which should also be considered severe. For example, in *Kelley v. Metropolitan County Board of Education*[42] the suspension of the interscholastic athletic program of a high school for one year was considered to merit notice of the charges and a hearing. The local school board imposed this punishment based on evidence that the high school students had marched around striking people at a basketball tournament and had struck and verbally abused the referee and delayed the next scheduled game.

The federal district court concluded that the right to engage in athletics is of "such significance and worth" and the suspension was "such drastic disciplinary action" that due process required that the school, through its principal, should be given notice of the charges against it and an opportunity to defend against the charges at a hearing.[43] In further explanation, the court stated that:

> We are confronted here with the denial of interscholastic athletic activities to an entire school in all sports for a period of one year, a penalty affecting the guilty and the innocent alike. This form of discipline has been correctly characterized in the record as group punishment. Although the right to pursue an academic education is not directly affected, the penalty infringes upon a facet of public school education which has come to be generally recognized as a fundamental ingredient of the educational process. It would appear obvious that before such a valuable interest is denied, the rudiments of fair play would dictate the right to notice and a hearing.[44]

In a case concerning cheating, a New York court has held that a high school student accused of cheating on the New York State Regents Examinations is entitled to notice and a hearing before being denied the opportunity to take the examinations again. The sanction was clearly a severe one because the student could not obtain his diploma without completing the Regents Examinations.[45]

Another court appears to have ruled that the hearing requirement applies to a transfer to home instruction. The court held that a suspended student was wrongfully denied notice and a hearing even though the high school offered to provide the student with home instruction which, after some delay, was in fact, forthcoming.[46]

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[38] *Id.* at 163.

[39] *Id.* at 163-64.

[40] 307 F. Supp. 517 (C.D. Cal. 1969).

[41] *Id.* at 522-23.

[42] 293 F. Supp. 485 (M.D. Tenn. 1968).

[43] *Id.* at 492-93.

[44] *Id.* at 493.

[45] Goldwyn v. Allen, 54 Misc. 2d 94, 281 N.Y.S. 2d 899 (Sup. Ct. 1967).

On the other hand, in the *Tibbs* case in New Jersey *(supra)*, one of the judges considered that notice and a hearing was not necessary "for temporary home instructions." This judge also felt that a hearing was not required for administrative action such as psychological treatment, detention or reprimand. To do so, he said, would be "most inappropriate" and "inimical" both to the educational welfare of the child and the school community.[47] Yet one of the other judges in that case expressly disagreed, saying that the constitutional rights of a high school student should not be dissipated by the local school board deciding that the penalty will be less than expulsion or a severe term of suspension.[48]

There is a decision by the Second Circuit which tends to suggest, but does not hold, that a hearing may not be required in order to transfer a public school student to another school. In *Madera v. Board of Education*,[49] a junior high school student in New York City was suspended by his principal after a period of more than a year of behavioral difficulties. The district superintendent notified the student's parents to attend a "Guidance Conference" with respect to the suspension. The parents asked to have legal counsel present, but the district superintendent refused their request pursuant to a rule of the Board of Education. The purpose of this Guidance Conference would have been to determine whether the student should be reinstated, transferred to another similar school, transferred to a school for maladjusted children, referred to the Bureau of Child Guidance for study and recommendation or referred to the Bureau of Attendance for court action.

Judge Constance Baker Motley, for the federal district court for the Southern District of New York, held that the no-attorney rule violated the student's constitutional right to a hearing. However, the Second Circuit reversed, ruling that if due process was applicable to the conference, it did not require the presence of counsel.

It seems clear that the Second Circuit did not view the possibliity of transfer as a severe sanction, and as to the other possible results such as court action, there would be further hearings before the student was subjected to any serious consequences. The court's opinion indicates a liberal attitude toward transfer which is all that could result "directly" from the Guidance Conference. Among other justifications for a transfer to a school for maladjusted children, the court mentioned their smaller classes, specially trained teachers, special programs, and more equipment and field trips. While a "certain social stigma" attaches to being placed in a school for socially maladjusted children, the court said that this is also true of other educational decisions, such as giving a low or failing mark. Moreover, an effort is made to reduce any stigma by sending the student to a school out of the neighborhood if possible.[50]

There is also authority which implies that a hearing is not necessary to place a high school student on one-year's probation where the probation is subject to frequent review.[51] Furthermore, there is some indication in the case law that the hearing requirement does not apply where students are merely denied some of their social privileges. In one of the cases involving college students who were expelled, there is dictum that "penalties such as the loss of certain social privileges" do not have to be protected by the same procedural safeguards which are necessary in expulsion or suspension proceedings.[52]

It seems apparent that certain administrative actions (other than expulsion or suspension) will obviously be severe enough to require notice and a hearing. For example, denying a student his diploma for misconduct should certainly require a hearing. On the other hand, it would not be easy to say that milder punishments clearly do not require a hearing. As the administrative action becomes less severe, whether or not a hearing is necessary really becomes a subjective judgment, and the persuasiveness of the student's attorney and the general attitude of the court, whether liberal or conservative, may ultimately be determinative.

The Courts Have Delineated the Elements of Notice and a Fair Hearing

The courts have covered the elements of notice and a fair hearing in remarkable detail. While most of this discussion has involved college students, there is no reason to suspect that there would be any considerable differences with respect to high school students. While it is obvious that "a demonstration in kindergarten" is "not the same as one in college,"[53] that kind of argument should be counterbalanced or outweighed by the fact that a high school student may need more safeguards than a college student because he is less mature and not as adept at fending for himself. As the federal district court said in the *Sullivan* case, "the high school student perhaps even more than the university student needs careful adherence to concepts of procedural fairness and reasonableness by school officials."[54]

In considering what the courts have said about the various elements of fair notice and hearing, it should be kept in mind that the court's expression of its views depends upon the particular circumstances involved. "The nature of the hearing," as the court said in *Dixon*, "should vary depending upon the circumstances of the particular case."[55] In adhering to the basic principle of fairly balancing the interests of the students against those of the school, the presence of a number of safeguards may mitigate against the absence of another safeguard. For example, one court agreed with the student that his hearing should be open to the press. While the school had required a closed hearing, the court said that this aspect was "ameliorated" by the fact that the student had been given the right to have counsel present and to confront and cross-examine the witnesses against him.[56] The student certainly had no clear right to these safeguards, as will be seen below.

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[46] R.R. v. Board of Education of Shore Regional H.S. District, 263 A.2d 180 (Super. Ct. Ch. N.J. 1970).

[47] Tibbs v. Board of Education, 276 A.2d 165, 171 (Super. Ct. App. Div. N.J. 1971) (concurring opinion of Conford, J.).

[48] *Id.* at 173 (concurring opinion of Kolovsky, J.).

[49] 267 F. Supp. 356 (S.D. N.Y. 1967), *rev'd.*, 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

[50] 386 F.2d at 783.

[51] Hasson v. Boothby, 318 F. Supp. 1183, 1188 (D. Mass. 1970). A holding to this effect with respect to college students is Sill v. Pennsylvania State University, 318 F. Supp. 608, 617 and 624-25 (M.D. Pa. 1970).

[52] French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969).

[53] 437 F.2d at 163.

[54] 307 F. Supp. at 1343.

[55] 294 F.2d at 158.

It should also be remembered that some of the cases were reviews of hearings already held while others were directives on how subsequent hearings should be conducted. It can be expected that if a court considers a particular safeguard desirable but not imperative, it will probably not overturn a hearing already held simply becuase it lacked that particular safeguard. However, if the court were directing that a hearing be conducted or giving instructions to school officials on how to hold a subsequent hearing, the court might order that this desirable safeguard be afforded to the student.

The Requirements Governing Notice of the Charges

The student must be given notice of the charges against him.[57]

Specific Charges. The notice must state the "specific" charges or grounds for disciplinary action.[58] It has been said that the notice must state the reasons for proposed action in "sufficient detail,"[59] and the student should be given "adequate" notice of the "specific ground or grounds and the nature of the evidence on which the disciplinary proceedings are based."[60]

Written Notice. Notice of the charges should be "in writing."[61] The school authorities should furnish the student "a written statement"[62] or "formal written notice"[63] of the charges, or they should give the reasons for their proposed action in a "letter."[64] However, one court ruled that because the high school student and his parent "beyond question" had "full knowledge of the manifold reasons for his suspension," the omission of formal written notice would be excused.[65]

In Advance of Hearing. The notice should be given in advance of the hearing, and due process includes the right to be "forewarned" of the charges.[66] The student should have "ample time before the hearing to examine the charges, prepare a defense and gather evidence and witnesses."[67] One court held that a specification of the charges two days before the hearing was sufficient,[68] but other courts have ruled that a statement of the charges should be furnished at least ten days prior to the date of the hearing.[69] Still another court set up a schedule whereby the student would have ten days to reply to the notice with affidavits and the hearing would be held ten days after receipt of the reply.[70] This meant that the notice had to be given at least 20 days prior to the hearing.

However, in *Due v. Florida Agricultural and Mechanical University*,[71] Judge Carswell, then of the federal district court for the northern district of Florida, ruled that notice of the charges given at the hearing is sufficient. This appears to be an aberration from the trend of authority and should not be followed, since it does not give the student a fair amount of time to prepare his defense, gather witnesses or secure other evidence in his favor.

To Parents. In the case of high school students, as the court said in the *Sullivan* case, the notice must be given to both the student and his parent or guradian.[72] The court explained that:

> Parents or guardians have legal obligations to children of high school age and common

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[56] Moore v. Student Affairs Comm. of Troy State University, 284 F. Supp. 725, 731 (M.D. Ala. 1968).

[57] Dixon v. Alabama State Board of Education, 294 F.2d 150, 151 and 158 (5th Cir. 1961); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Jones v. State Board of Education, 279 F. Supp. 190, 199 (M.D. Tenn. 1968); Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967); Knight v. State Board of Education, 200 F. Supp. 174, 178 (M.D. Tenn. 1961); Due v. Florida A. & M. University, 233 F. Supp. 396 (N.D. Fla. 1963); Schiff v. Hannah, 282 F. Supp. 381, 383 (W.D. Mich. 1966); Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 758 (W.D. La. 1968); Barker v. Hardway, 283 F. Supp. 228, 236 (S.D. W. Va. 1968); Scroggin v. Lincoln University, 291 F. Supp. 161, 171 (W.D. Mo. 1968); Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416, 420 (W.D. Wis. 1969); French v. Bashful, 303 F. Supp. 1333, 1335 (E.D. La. 1969); Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1343 (S.D. Tex. 1969); Black Students of North Ft. Meyers Junior-Senior High School, *ex rel.* Shoemaker v. Williams, 317 F. Supp. 1211, 1216 (M.D. Fla. 1970); Kelley v. Metropolitan County Board of Education, 293 F. Supp. 485, 494 (M.D. Tenn. 1968).

[58] Dixon v. Alabama, 294 F.2d 150, 158 (5th Cir. 1961); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Scroggin v. Lincoln University, 291 F. Supp. 161, 171 (W.D. Mo. 1968); Bistrick v. University of South Carolina, 32 F. Supp. 942, 950 (D. S.C. 1971); Woody v. Burns, 188 So.2d 56, 58 (Dist. Ct. App. Fla. 1966).

[59] Schiff v. Hannah, 282 F. Supp. 381, 383 (W.D. Mich. 1966).

[60] General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 FRD 133 (1968) [hereinafter cited as General Order].

[61] *Id.* at 133.

[62] Estaben v. Central Missouri State College, 277 F. supp. 649, 651 (W.D. Mo. 1967).

[63] Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1346 (S.D. Tex. 1969).

[64] Schiff v. Hannah, 282 F. Supp. 381, 383 (W.D. Mich. 1966).

[65] Davis v. Ann Arbor Public Schools, 313 F. Supp. 1217, 1226-27 (E.D. Mich. 1970).

[66] Knight v. State Board of Education, 200 F. Supp. 174, 178 (M.D. Tenn. 1961); Bistrick v. University of South Carolina, 324 F. Supp. 942, 950 (D. S.C. 1971).

[67] Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1343 (S.D. Tex. 1969).

[68] Jones v. State Board of Education, 279 F. Supp. 190, 199 (M.D. Tenn. 1968).

[69] Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967); Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968).

[70] Schiff v. Hannah, 282 F. Supp. 381, 383 (W.D. Mich. 1966).

[71] 233 F. Supp. 396 (N.D. Fla. 1963).

[72] 307 F. Supp. at 1346.

> sense dictates that they should be included in any disciplinary action against their children which could result in severe punishment. Indeed it may be even more crucial that proper written notice of charges be provided to parents for often they do not know what has transpired at school.[73]

Reply by Student. In one case, the court went so far as to provide for a reply by the student in advance of the hearing.[74]

Waiver. A student cannot complain of lack of notice and an opportunity to be heard if the reason for this is his failure to keep the school authorities advised of his address.[75]

The Requirements As to Notice of the Evidence

The student is entitled to know the "nature of the evidence" against him in addition to the charges.[76] The courts have also said that the student should be "permitted to inspect *in advance*" of the hearing "any affidavits or exhibits" which the authorities intend to submit.[77] Similarly, other courts have said that the student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies.[78] Additionally, in the *Sullivan* case, the court required that formal written notice of the evidence against a high school student be given to the student and his parents or guardian.[79]

On the other hand, in *Wasson v. Trowbridge*, the Merchant Marine Academy case, the Second Circuit held that the cadet was "not entitled to see the confidential opinions of members of the faculty." This was made subject to an important safeguard, however. Because a cadet would be "utterly unable to defend against unknown evidence," he should not be dismissed "without the holding of an evidentiary hearing into the nature of the concealed evidence, if any, and the reason for withholding it."[80]

The Components of a Fair Hearing

As the Fifth Circuit said in *Dixon*, the hearing should be "more than an informal interview with an administrative authority." The hearing should give the administrative authorities "an opportunity to hear both sides in considerable detail" and the "rudiments of an adversary proceeding" should be "preserved."[81] However, it is not necessary that a school "adopt all the formalities of a court of law,"[82] nor does due process require "a formal court type judicial hearing such as is required in criminal cases."[83] The hearing may be "procedurally informal" and "need not be adversarial," according to the Second Circuit in *Wasson*.[84]

Before Suspension. The cases emphasize that the student is entitled to notice and a hearing "before" he is suspended.[85] Thus, the courts have held that unless there is danger to the physical or emotional safety and well-being of the student involved or to other students or faculty or danger to school property, there should be no long-term suspension without a prior, full hearing. However, if there is reasonable cause to believe that such danger exists, there may be an interim suspension, provided there is a preliminary hearing. If a preliminary hearing is impossible, the student may be suspended for about two weeks on an *ex parte* basis.[86]

Nevertheless, in one case, the court did uphold a procedure whereby students were suspended and were advised that they could have an appeal hearing thereafter.[87] And it has been said as dictum that:

> No principle of law requires an educational institution to commence disciplinary proceedings at a time when the campus is in an uproar. Appropriate action can be taken consistent with the circumstances to insure the temporary removal of students and others who persist in efforts to reduce the academic community to a state of permanent chaos. The hearing of disciplinary cases produced by violent student conduct may, and probably should, be continued for a reasonable time consistent with conditions on the campus.[88]

Impartial Board. The administrative authorities conducting the hearing must be "impartial."[89] The "disciplining official should endeavor to maintain a neutral position until he has heard all of the facts."[90] A "fair hearing presupposes an impartial trier of fact," and "prior involvement in a case renders impartiality most difficult to maintain." However, in certain situations the "closeness" of school life and limited personnel "may at times make it unduly burdensome or impossible to secure a panel wholly lacking previous contact with the events in issue, yet the hearing must proceed."[91] Moreover, one court expressed the view that there is no violation of procedural due process when a member of a disciplining body at a university sits on a case after he has shared with other members information concerning the facts of a particular incident. The court held that the students involved were not denied due process even though two members of the hearing board testified against them, because they had had the opportunity to show that the board was biased and the court felt that the record "showed clearly" that the board was not biased or prejudicial.[92]

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[73] *Id.* at 1343.

[74] Schiff v. Hannah, 282 F. Supp. 381, 383 (W.D. Mich. 1966).

[75] Wright v. Texas Southern University, 392 F.2d 728 (5th Cir. 1968).

[76] General Order, 45 FRD 133, 147 (W.D. Mo. 1968).

[77] Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967); Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968).

[78] Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir. 1961); Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968); Bistrick v. University of South Carolina, 324 F. Supp. 942, 950 (D.S.C. 1971).

[79] 307 F. Supp. at 1346.

[80] 382 F.2d at 813.

[81] 294 F.2d at 158-59.

[82] Jones v. State Board of Education, 279 F. Supp. 190, 205 (M.D. Tenn. 1968).

[83] Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

[84] 382 F.2d at 812.

[85] Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967); Kelley v. Metropolitan County Board of Education, 293 F. Supp. 485, 493 and 494 (M.D. Tenn. 1968); Black Students of North Ft. Meyers Junion-Senior High School, *ex rel.* Shoemaker v. Williams, 317 F. Supp. 1211, 1215 and 1216 (M.D. Fla. 1970).

[86] Stricklin v. Regents of University of Wisconsin, 297 F. Supp. 416, 420-21 (W.D. Wis. 1969); R.R. v. Board of Education of Shore Regional High School District, 263 A.2d 180, 186 (Super. Ct. Ch. N.J. 1970).

[87] Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968). In addition, in Banks v. Board of Public Instruction, 314 F. Supp. 285, 291-93 (S.D. Fla. 1970), the court distinguished the public school situation from the college situation and held that, in the case of a public school student, the hearing need not be in advance of the suspension. However, the Supreme Court recently vacated this judgment, as explained *supra*, n. 34. 91 S. Ct. 1223 (1971).

[88] Scoggin v. Lincoln University, 291 F. Supp. 161, 172 (W.D. Mo. 1968).

[89] Jones v. State Board of Education, 279 F. Supp. 190, 197 (M.D. Tenn. 1968); Esteban v. Central Missouri State College, 277

Presentation of Defense. The student has the right to present his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf.[93] The student "must be given an adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evidence."[94] Due process requires that students be afforded the opportunity to present the following: "their version" as to the charges,[95] their side of the case,"[96] their "position, explanations and evidence,"[97] and their case "by way of witnesses or other evidence"[98] and by way of "affidavits, exhibits and witnesses as they desire."[99]

In addition, the student must be permitted to present his defenses to the persons who will take any disciplinary action. One court objected to the fact that the person to whom the students were permitted to make their explanation was only one of a number of persons who made the recommendation of suspension. The court said that "it is imperative that the students charged be given an opportunity to present their version of the case and to make such showing as they desire to the person or group of persons who have the authorized responsibility of determining the facts of the case and the nature of action, if any, to be taken."[100]

Legal Counsel. Although there is a definite split of authority on the issue, a respectable number of courts have now held that students should be given the opportunity to be represented by counsel.[101] In one of the cases holding that students should be permitted to have counsel, the court limited the counsel's role to advising the students and would not allow the counsel to question any witnesses giving evidence against the students.[102] In another case, the students were held to be entitled to retain counsel but not to have counsel appointed for them, since the discipline committee was represented by a senior law student who was chosen to prosecute because of his familiarity with legal proceedings.[103]

In Wasson v. Trowbridge, the Second Circuit ruled that "the requirement of counsel as an ingredient of fairness is a function of all the other aspects of the hearing."[104] The Merchant Marine cadet involved was not entitled to counsel because, among other reasons, the authorities did not proceed through counsel. However, in makig this ruling, the court also took into account that the hearing was "investigative," "non-criminal," and "not adversarial," and the student was "mature and educated" and in a position to develop the facts himself. "Taken as a whole," the court said, "the other aspects of the hearing were fair."[105] But other courts have ruled, without qualification, that it is not necessary to have attorneys either present or formally waived and that the refusal of a request for counsel does not amount to a denial of due process.[106] At the same time, it may be wise for the hearing board to be guided by counsel. Indicatively, one judge was led to comment that "it is unfortunate" that the hearing committee "did not have the assistance of legal counsel to guide it."[107]

It seems that there is now a good chance that a court can be persuaded to allow students to be represented by counsel, In addition to the authority of the favorable

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F. Supp. 649, 651 (W.D. Mo. 1967); Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970).

[90] Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1343 (S.D. Tex. 1969).

[91] Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967).

[92] Jones v. State Board of Education, 279 F. Supp. 190, 200 (M.D. Tenn. 1968).

[93] Dixon v. Alabama State Board of Education, 294 F.2d 150, 159 (5th Cir. 1961).

[94] Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967).

[95] Esteban v. Central Missouri State College, 277 F. Supp. 649, 651 and 652 (W.D. Mo. 1967).

[96] Knight v. State Board of Education, 200 F. Supp. 174, 178 (M.D. Tenn. 1961).

[97] General Order, 45 FRD 133, 147 (W.D. Mo. 1968).

[98] Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1346 (S.D. Tex. 1969).

[99] Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967).

[100] *Id.* at 651.

[101] *Id.* at 651-52; Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 752 (W.D. La. 1968); Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968); French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969); Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970); Goldwyn v. Allen, 281 N.Y.S.2d 899, 905 (Sup. Ct. 1967); R.R. v. Board of Education of Shore Regional High School District, 263 A.2d 180, 187 (Super. Ct. Ch. N.J. 1970).

[102] Esteban v. Central Missouri State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967).

[103] French v. Bashful, 303 F. Supp. 1333, 1337 (E.D. La. 1969).

[104] 382 F.2d at 812.

[105] *Id.*

[106] Due v. Florida A. & M. University, 233 F. Supp. 396, 403 (N.D. Fla. 1963); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968); General Order, 45 FRD 133, 146 (1968). In Madera v. Board of Education, 386 F.2d 778 (2d Cir. 1967), as noted earlier, the Second Circuit held that it was not necessary to allow representation by counsel at a "Guidance Conference," but it added that "what due process may require before a child is expelled from public school. . . is not before us." (386 F.2d at 788.)

[107] Scoggin v. Lincoln University, 291 F. Supp. 161, 173 (W.D. Mo. 1968).

decisions which have directly passed on the question, a good argument can also be based on the recent decision of the Supreme Court in *Goldberg v. Kelly.*[108] In that case, the Court required a hearing prior to termination of welfare payments and expressly ruled that the welfare recipient "must be allowed to retain an attorney if he desires." Counsel, the Court said, can "help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." The Court added that it did not anticipate that this would "unduly prolong or otherwise encumber the hearing."[109] I would argue that a high school education is an aspect of personal welfare which is just as vital to a young person as welfare payments are to a qualified recipient, and that the high school student should therefore be accorded the same right to counsel.[110]

Cross-Examination. Some courts have held that students should be permitted to cross-examine the witnesses against them.[111] However, *Dixon*, the leading case, states that "the right to cross-examine witnesses" is not "required,"[112] and there is further authority that confrontation and cross-examination of witnesses need not be provided for.[113] Again, *Goldberg v. Kelly* provides strong authority for establishing the right of cross-examination for students. The Supreme Court held that welfare recipients "must" be given "an opportunity to confront and cross-examine the witnesses relied on" by the Welfare Department,[114] explaining that:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.[115]

Non-Public. The courts have stated that the hearing need not be public.[116] Moreover, one case suggests that a closed hearing will be approved, although in that case the school officials granted the student's request for an open hearing.[117]

Advice As to Rights. The hearing need not provide for "warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of witnesses, or any of the remaining features of federal criminal jurisprudence."[118] School officials are not required "to advise a student involved in disciplinary proceedings of his right to remain silent and to be provided with counsel."[119]

Report and Transcript. The trend of authority indicates that a report of the hearing board's decision should be made, and the student should be entitled to a transcript of the hearing if he desires. Three courts have ruled that the discipline committee should put their findings in a report open to the student's inspection.[120] Another court has held that the school official conducting the hearing should "state in writing his finding as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action."[121] Moreover, "either side may, at its own expense make a record of the events at the hearing."[122] And in *Dixon*, the Fifth Circuit said that "if the hearing is not before the Board [of Education] directly, the results and findings of the hearing should be presented in a report open to the student's inspection."[123] The opinion of Judge Carswell in the *Due* case, that "there need be no stenographic or mechanical recording of the proceedings" conflicts with the mainstream of authority.[124] This decision, however, is conservative in other respects too.

Substantial Evidence. Sanctions may be imposed only on the basis of "substantial evidence."[125] In addition, each case should be decided "solely" on the evidence presented at the hearing.[126]

Punishment. Punishment is a "matter of judgment and discretion" as long as it is "within the recognized limits." There are only two questions to be asked with respect to the punishment imposed: "Is the punishment meted out within acceptable limits, and, if it is, did the authorities act arbitrarily or capriciously?"[127]

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[108] 397 U.S. 254 (1970).

[109] *Id.* at 270-71.

[110] *Compare* the statement in the *Dixon* case that: "It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as comoletely as possible the duties and responsibilities of good citizens . . ." 294 F.2d at 157; *with* the statement in Goldberg v. Kelly that: "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . ," 397 U.S. at 264.

[111] Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967); Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968); Keene v. Rodgers, 316 F. Supp. 217, 221 (D. Me. 1970); Tibbs v. Board of Education, 276 A.2d 165 (Super. Ct. App. Div. N.J. 1971).

[112] 294 F.2d at 159.

[113] General Order, 45 FRD 133, 146-47 (1968); Davis v. Ann Arbor Public Schools, 313 F. Supp. 1217, 1227 (E.D. Mich. 1970).

[114] 397 U.S. at 270.

[115] *Id.* at 269.

[116] Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 768 (W.D. La. 1968), Gereral Order, 45 FRD 133, 146-47 (1968).

[117] Buttny v. Smiley, 281 F. Supp. 280, 288 (D. Colo. 1968).

[118] General Order, 45 FRD 133, 146-47 (1968).

[119] Buttny v. Smiley, 281 F. Supp. 280, 287 (D. Colo. 1968).

[120] French v. Bashful, 303 F. Supp. 1333, 1338-39 (E.D. La. 1969); Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968); Woody v. Burns, 188 So.2d 56, 58 (Dist. Ct. App. Fla. 1966).

[121] Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967).

[122] *Id* at 652; Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968).

[123] 294 F.2d at 159.

[124] Due v. Florida A. & M. University, 233 F. Supp. 396, 403 (N.D. Fla. 1963).

[125] Jones v. State Board of Education, 279 F. Supp. 190, 200 (M.D. Tenn. 1968); Esteban v. Central Missouri State College, 290 F. Supp. 622, 631 (W.D. Mo. 1968); Sullivan v. Houston Independent School District, 307 F. Supp. 1328, 1346 (S.D. Tex. 1969); General Order, 45 FRD 133, 147 (1968); Sill v. Pennsylvania State University, 318 F. Supp. 608, 621 (M.D. Pa. 1970); Bistrick v. University of South Carolina, 324 F. Supp. 942, 950 (D.S.C. 1971).

[126] Esteban v. Central Missouri State College, 277 F. Supp. 649, 652 (W.D. Mo. 1967); Marzette v. McPhee, 294 F. Supp. 562, 567 (W.D. Wis. 1968).

[127] Buttny v. Smiley, 281 F. Supp. 280, 289 (D. Colo. 1968).

Group Treatment. The circumstances of a situation may be such that individual notice and hearing may not be required for each student. It may be that one responsible person may represent a whole group. In the *Kelley* case, the interscholastic athletic program of an entire high school was suspended for one year. However, the court made it clear that it was not necessary to have an individual hearing for each student since the school could be represented by its principal. The court said that:

> This Court is of the opinion that under the circumstances of this case individual notice and a hearing for each student was not required by due process of law. In cases of possible group misconduct on the part of students due process is satisfied if the notice and opportunity to defend are afforded to a responsible person whose position requires him to represent and speak for the entire group. A school principal occupies such a position.[128]

Waiver. Just as notice may be waived by a student's conduct, his conduct may also give rise to a waiver of his right to a hearing. Where a high school pupil and his father were warned to contact the superintendent about reinstatement and they refused to do so, the court held that their refusal amounted to a waiver of the right to a hearing.[129]

Appeal. One court went so far as to recommend that the school establish a procedure for appeal, saying that "we recommend that each disciplinary procedure incorporate some system of appeal." If there is an appeal, the court said that this may be a hearing de novo.[130]

Concluding Comment

In the cases discussed above, the courts are saying to the public school officials that their idea of the Constitution has been too small. The Constitution extends more due process protection to public school students than school officials apparently believed. On the other hand, the decisions do not give high school students an unlimited license to do whatever they please; they remain subject to discipline if such is found merited at a fair hearing with proper safeguards.

It is important to remember, however, that the way the school treats an individual student has a significant impact on the whole student body. If fairness rather than arbitrariness pervades the handling of one student or one situation, other students will have good reason to be more satisfied with their "system." In the broader context, therefore, it seems that the courts have enunciated standards of fairness which, if widely followed in practice, should tend to diminish students' general feeling of dissatisfaction and discontent with the "system"—an attitude which concerns us all deeply.

POVERTY LAW DEVELOPMENTS

Copies of documents abstracted below are available from the National Clearinghouse, except those reprinted in full text in the CCH POVERTY LAW REPORTER. All documents requested must be identified by use of the Clearinghouse Library number appearing at the beginning of each abstract. Requests from attorneys practicing in OEO-funded Legal Services projects will be filled free of charge, not to exceed one copy of each document per project. Other requests must be accompanied by a remittance of five cents per page to cover duplicating costs plus a postage and handling charge of 75 cents for the first 30 pages and an additional 25 cents for each additional 30 pages or fraction thereof. All requests should be addressed to the National Clearinghouse for Legal Services, Northwestern University School of Law, Abbott Hall, 710 North Lake Shore Drive, Chicago, Illinois 60611.

BANKRUPTCY

Retirement Trust Payments Not Asset of Bankrupt's Estate

6445. ***In re* Byrd,** No. 36693 (D. Conn., Aug. 23, 1971). [Here reported: 6445A Order (6 pp.).]

A trustee in bankruptcy filed a petition requesting the federal court to determine the respective rights of the trustee, the bankrupt and the administrator of a retirement trust sponsored by bankrupt's employer. During his employment, bankrupt had paid 5% of his salary, and his employer had paid twice that amount into a trust fund. Under the provisions of the retirement trust contract, bankrupt's interest in the trust were unassignable and immune from creditor action.

The court held that the provisions of the trust are fully effective under the Bankruptcy Act §70a (5), and that bankrupt's interest cannot be treated as an asset of his estate. Section 70a (5) provides that a trustee of a bankrupt's estate is vested by operation of law with the title to property which the bankrupt could have transferred by any means prior to the filing of the bankruptcy petition. Since bankrupt's interest is not transferable under the terms of the contract, such interest does not fall within §70a (5) and does not pass to the trustee.

The trustee contended that the private contractual terms providing that the interest is not subject to the claims of creditors cannot operate to create an exemption when none has been granted by state or federal law. However, the court concluded that the fact that the source of the protection for the bankrupt's interest is a private contract and not public legislation is not controlling because the public policy goals served by permitting exemption of an interest in a retirement trust are present in either case.

Payment of Filing Fee No Longer Precondition to Discharge

6537. ***In re* Kras,** No. 71B972 (E.D. N.Y., Sept. 13, 1971). Petitioner represented by Morton Dicker and Kalman Finkel, The Legal Aid Society, 267 W. 17th St., New York, N.Y. 10011, (212) 691-8320. Of counsel, John E. Kirklin, The Legal Aid Society, 267 W. 17th St., New York, N.Y. 10011. [Here reported: 6537A Petitioner's Memorandum (24 pp.); 6537B Decision (21 pp.).]

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[128] 293 F. Supp. at 493.

[129] Grayson v. Malone, 311 F. Supp. 987 (D. Mass. 1970).

[130] Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 761 and 768 (W.D. La. 1968).

Codes For High School Students

By Patricia M. Lines

Growing student activism in high schools seems to be inspiring the wholesale manufacture of new rules, regulations, student codes, and statements of "rights and responsibilities." Many such codes have been created by school administrators and teachers seeking to control the school environment. These codes typically prescribe acceptable standards for conduct, appearance and speech. Some have been challenged in the courts and found invalid, but many remain on the books. In contrast, students, sympathetic teachers and administrators, and lawyers groups have also been developing codes. Generally, these codes acknowledge the existence of students' rights, define and list offenses, outline a fair procedure to follow if a student is accused of some such offense, and state specific punishments for specific offenses.

Whatever its origin, the proliferation of codes raises several questions: Why should anyone want a code at all? Where do school officials get the authority to promulgate codes? What limits are there on this authority? If there must be a code, what should it say? This article aims to provide some answers to these questions. There is a brief discussion of the case law relating to codes, but no attempt will be made here to provide an exhaustive analysis of students' rights. There is also an outline of a code which would recognize both the constitutional rights of students and the school administration's duty to maintain a school atmosphere which is conducive to learning. Finally, there is a discussion of how students should proceed if they wish to implement such a code in their school or district.

Why Have a Code?

1. To clarify the law

At first blush, the code seems unnecessary. Teachers ought to be able to perform their function as teachers adequately by relying on already existing laws prohibiting criminal activity. Serious classroom disruptions – threats of violence, violence, carrying drugs or weapons – would merit a telephone call to parents or police. Conversely, students possess constitutional rights whether or not they are recited in some official Board of Education document. A code is not needed, then, unless it requires or guarantees something which is not clearly already required or guaranteed.

Unfortunately, however, the existing law governing students' rights and obligations is not very clear or precise. Despite the Supreme Court decision in *Tinker*, upholding the right of students to express their views by wearing black arm bands,[1] lower courts have subsequently undercut *Tinker.*[2] Despite countless cases upholding the right of students to determine their own dress and grooming styles,[3] just as many courts still permit school districts to regulate these private matters.[4] Similar judicial conflicts exist over the validity of corporal punishment.[5] A code can, therefore, eliminate the gray areas in the law for both teachers and students.

2. To create new rights

Secondly, a code could create students' rights which have never been established by any court. This might include the right to have a student government[6] and to participate in decisions affecting student extracurricular activities, curriculum, and student disciplinary procedures. It might make available grievance procedures to students who wish to bring charges against a teacher or principal. Or the code might provide for a student ombudsman.[7] Any number of processes could be created which would give students a voice in decision-making and which provide an opportunity to learn first-hand how to function in a democratic framework.

3. To detail offenses

Just as a code can guarantee rights to students which are not necessarily guaranteed under the Constitution, it may also regulate behavior which is not necessarily culpable under existing criminal or civil laws. In some cases the need for the regulation hardly seems to justify the restriction on the student's liberty. For example, many recent cases betray the schoolman's penchant for restricting beards, long hair (even, in at least one case, bangs on females), criticism of teachers and their ways, and political expression. To be fair, however, school officials do have legitimate reasons for regulating some noncriminal conduct. A good teacher does not allow major and continued disruptions in his or her classroom, and he or she will protect students from their fellow students. Hazing, water fights, firecrackers, and the like are the traditional foibles of mischievous students. Respected and effective teachers mete out fair punishment in these cases. The key to reasonable rules of this type is their relevance to the essential functions of the school.[8] Of course, as discussed below, there are constitutional and other legal restrictions on what any school official may do. It would be illegal to impose severe punishment (suspension, expulsion, corporal punishment) except for the most severe offenses and then only after procedural due process has been scrupulously observed.

4. To replace the "unwritten code"

A code which does no more than describe which activities will get students into what kinds of trouble may not seem advantageous to students, but it is better than an ambiguous "unwritten code." A published code at least gives a student fair warning, and is easier to challenge in the courts. Thus, even such a code can help prevent teachers and principals from imposing arbitrary and *ad hoc* rules. This protection could be specifically included in the code. For example, the 1965 Discipline Code of the University of Oregon provides that "no sanction or other disciplinary action shall be imposed on a student . . . except in accordance with this code."[9] Although the unwritten code probably should be challenged in court as "void for vagueness," the uncertainty facing the student before hand makes this a somewhat more hazardous course. Although it seems grossly unfair to the student, some courts have upheld disciplinary procedures, even physical punishment, executed by a teacher in the absence of any specific rule.[10]

5. To spell out procedural due process

The law detailing procedural due process is fuzzy indeed. Sometimes one or two unfair elements in a whole process will be tolerated by the court, but the implication is that additional unfair actions would taint the entire proceeding. An unwritten disciplinary procedure may be difficult to challenge, because its full scope may not be revealed in any single case. Without a code, school officials and students must submit to the awkward and tedious trial-and-error methods of testing and retesting in order to establish what is fair and what is not. Worse, time and cost might well discourage students from asserting their rights, especially where the punishment is not thought severe, or the right, not important. Although it seems most sensible and necessary to reduce disciplinary procedures to writing, this is not always done, and such omission has not yet been declared unconstitutional by the federal courts.[11]

6. To guide teachers and students in democratic processes

A good code can be instructional. Teachers and students are not expected to know the fine points of constitutional law. A good code can guide teachers in deciding what they should and should not do when faced with a disciplinary problem. Conversely, the same document, if readily available to the student, tells him what his rights are and what procedures he should follow to assert them. Codes which are intended to be instructional should be simple in style and organization, should acknowledge existing laws and constitutional requirements, and should be widely distributed. The "Statement of Students Rights and Responsibilities" issued by the Seattle School Board fits these criteria. It is a single sheet of paper, makes brief references both to existing constitutional rights of students and to criminal laws, and outlines procedural due process requirements. The code of the University of Oregon, although somewhat longer, is also clear, well organized, and widely distributed.[12]

More than this, however, a good code can teach students the fundamental principles of democracy by involving them in the rule-making and decision-making processes. Order in the classroom is less easily attained when only school authorities want it. It is a natural achievement where students have the authority to regulate themselves. Such thoughts lead to codes which allow students to participate in rule-making, and to participate in adjudicating cases brought under these rules. This philosophy is incorporated in the code promulgated by the Board of Education of New York City, which provides that "The student government shall be involved in . . . establishing disciplinary policies."[13] It is also reflected in Philadelphia's code, which gives students "the right to participate in the establishment of regulations regarding discipline . . . "[14] Some universities, such as Oregon, have established courts (a majority of the members of which are students) which hear all disciplinary cases, subject to appeal to a court composed of half students and half faculty members.[15] The concept of including students in the actual disciplinary process has been adapted to high schools in the model codes prepared by the Juvenile Law Center[16] and the Youth Council of San Francisco.[17]

Where do School Officials Get the Authority to Promulgate a Code?

Public school officials[18] receive their authority to regulate student conduct either from the legislature or from parents.[19] The legislature expressly delegates authority through general or specific statutory grants. Parents, on the other hand, presumably place school officials *in loco parentis* when they send the child to school – public or private. The doctrine has become increasingly irrelevant since the advent of compulsory education laws, for children may be in school against the wishes of parents.[20] Thus, to be valid, school codes must be within the scope of delegated legislative authority and, as discussed in the next section, must not infringe on the constitutional rights of students, parents or teachers.

Until the 1930's, the judiciary took a narrow view of the scope of any government's authority. This meant that the courts would strictly construe a school district's statutory authority.[21] Thus, restrictions on students' social activities have been deemed *ultra vires*[22] – beyond the power of the school board – unless the restriction was confined to that which would be necessary to assure performance of studies.[23] Other acts deemed to be *ultra vires* in similar decisions included requiring a child to perform chores,[24] and requiring school patrols.[25] Excessive punishment could also be deemed *ultra vires*, even if the school rule was itself valid. For example, in a state where the law required a flag salute in school, the court refused to permit school authorities to expel children for failure to comply, because the law provided no specific punishment.[26] This court found it unnecessary to consider the constitutional questions. As another example, a state court has held that school officials have no authority to withhold the diplomas of students who refuse to wear caps and gowns in a graduation ceremony, although they may exclude them from the ceremony.[27]

This doctrine should not be confused with constitutional limitations on school authorities. A school rule might be permissible under the Constitution, but it can still be invalid if the state legislature has not delegated power to school officials to pass the rule. For example, legislatures might prohibit membership in fraternal organizations by statute,[28] or expressly delegate this authority[29] but school boards, in the absence of an express law, may not.[30]

The *ultra vires* principal is not often cited today,[31] but it remains a sound doctrine. Although courts today are more willing to imply specific authority from general statutes, *ultra vires* may be a useful ground for objecting to certain school rules. For example, although not necessarily unconstitutional, it would be beyond the authority of the school board to attempt to regulate conduct of students in places and at times which are totally unrelated to school activities. Legislatures do not normally give school officials the authority which they might give to municipalities to police unlawful acts taking place outside of school. As stated in dicta in a 1967 case in Iowa:

> . . . it is not within their power to govern or control the individual conduct of students *wholly* outside the school room or play grounds. However, the conduct of pupils which directly relates to and affects management of the school and its efficiency is a matter within the sphere of regulation by school authorities.[32]

In effect, the *ultra vires* doctrine gives students a right to be free of school discipline in all off-campus activities. If school officials are upset by something a student has done when beyond their official reach, they should handle the matter just as they would if an adult had committed the act. That is, they should complain to the police or sue the student for tort, libel, tresspass, or whatever is appropriate.

Constitutional Limitations

Even if the legislature grants school officials a clear mandate to regulate specific conduct, a regulation may be unconstitutional. Both legislature and school officials must always act within the bounds of both federal and state constitutions. Therefore, for the benefit of future code writers or revisers, examples of relevant judicial decisions which are favorable to students are summarily reviewed here.[33] Readers in need of extensive legal analysis are referred to the bibliography contained in the Students Codes Packet.

1. The scope of students' rights

The Supreme Court in *Tinker* declared that "students in school as well as out of school are 'persons' under our Constitution."[34] In other words, students are people and are entitled to the full range of constitutional rights granted to any person. The student, like anyone else, does not have unfettered freedom to do as he pleases, however. For example, just as it is relevant to note that a man shouting "Fire!" is in a crowded theater,[35] so is it relevant to note that a person may be in a schoolhouse. The fact that the individual is a student in school does not mean he is a second-class citizen. It is relevant only if it helps establish a clear justification for a restrictive rule.[36] Under the test applied by the courts, before school authorities may in any way limit the rights of students, they must show that the limitation is "compelling and necessary" to prevent material disruption in the class, or to prevent the invasion of the rights of others.[37] In cases involving both students' rights and school discipline, the courts must balance the competing concerns for the individual freedom of the student and regulation of the school environment. For example, in some of the cases discussed below, the courts were more attentive if the case involved student expression of a point of view on a "serious" issue, such as the war in Vietnam or school operations. In these cases, school officials were asked to tolerate minor disruptions resulting from such activities. The courts were less inclined to help students who were seeking protection for expression in areas the court considered vulgar or trivial (e.g., profanity). Finally, courts seem most ambivalent where two important rights must be balanced against one another. For example, a few years ago New York City students published anti-religious views in a state-supported student newspaper. A group of offended religionists brought suit. The court deciding the case gave religion priority over speech, and said that state facilities could not be used to propagate any religious or antireligious point of view.

2. Freedom of speech and press

With freedom of expression, students, or any other citizens, have the weapon needed to win other rights. Without it, criticism of repressive tactics can be stilled. Few indeed are the situations where the need for regulation would outweigh the need for free and unhampered exercise of the right. The Supreme Court reaffirmed the particular importance of free expression for students most recently in *Tinker*, when it upheld the right of students to wear black armbands as a symbol of their disagreement with the Vietnam war. Other recent decisions have recognized the right of students to publish their views, even when they are critical of the school administration.[38] As in the adult world, freedom of speech extends to freedom from regulation of the content of the speech,[39] freedom from prior censorship or restraint on speech,[40] and freedom to distribute literature, subject only to reasonable-time-and-place regulations.[41] It protects students in a wide range of activities from publication of underground newspapers[42] to the simple wearing of buttons[43] or armbands.[44] It includes the right to hear outside speakers[45] and read printed matter[46] and the right to obtain space in official school newspapers to publish their views, no matter how unpopular they might be.[47]

Most courts would also recognize that school officials have a valid interest in maintaining order in the classroom during class hours, and in regulating the traffic flow in school hallways. Thus, activity which causes a substantial disruption to the normal conduct of the school may be proscribed. Minor irritations are not sufficiently disturbing to warrant major punishments, however. A Houston case provides an example: An underground newspaper appeared at a Houston high school, littering the lavatories and inspiring teachers to confiscate it during class. The court ruled that this commotion was not a substantial disruption and school officials could not expel the student publishers.[48]

Punishment for something a student has said, written, published, or distributed violates not only the Constitution, but the educational process itself. Where students, teachers, and other citizens are encouraged to express their views on any subject, the free flow of ideas should stimulate learning in a way that cannot be achieved in a less open atmosphere. Moreover, students are not likely to emerge into the adult world and contribute fully to the workings of government if they have been taught only to parrot their teachers. Therefore, teachers and administrators who are genuinely interested in the education of their students will encourage them to express their views in every available medium.

3. Freedom of assembly and association.

The courts have been less clear in defining the rights of students to engage in demonstrations free of reprimand, or to gain the blessings of school officials for student organizations. Where free speech is not directly in jeopardy, the courts seem more willing to allow restrictive school measures. Of course, participation in a peaceful demonstration is very much akin to the exercise of free speech, and is entitled to much the same protection as free speech.[49] However, where the demonstration is disorderly, or clearly could become disorderly, the courts will undoubtedly uphold school disciplinary measures against demonstrating students.[50]

The right of students to associate together is indisputable,[51] of course. However, in a 1915 decision [*Waugh v. Board of Trustees*], the Supreme Court held that a university could refuse admission to anyone who would not sign a pledge repudiating membership in a fraternity.[52] Although not overruled, this case has been distinguished recently in the lower federal courts in a variety of situations. In departing from *Waugh*, courts first of all have required equal treatment of student groups, if any are recognized at all. School officials may not selectively refuse official status only to these groups which have sponsored unpopular causes. For example, in deciding against southern school officials who refused recognition to a local chapter of ACLU, a federal court noted that the school recognized other political groups (Young Republicans and Young Democrats).[53] Second, as pointed out in another case, political organizations are entitled to greater protection under the first amendment than are social organizations, and *Waugh* is not entirely relevant. This latter court overruled officials who had denied recognition to an independently organized Students for a Democratic Society. The court ordered a hearing on the matter, noting that if substantial evidence was produced to show that the club had "violent activism" as a purpose, the university could exclude it. The court said:

> No student group is entitled, per se, to official college recognition. Rather, once a college allows student groups to organize and grants these groups recognition, with the attendant advantages, constitutional safeguards must operate in favor of all groups which apply. This requires adequate standards for recognition and the fair application of these standards.[54]

Although these are cases involving colleges, the principles apply to high schools as well. If students are sufficiently mature to desire to organize a group, school officials should be sufficiently mature to state a rational and fair basis for identifying those groups which will be "recognized" by the school.

4. Freedom from vague, uncertain or overly broad regulations

Worse than a restrictive regulation, a vague regulation of uncertain scope might effectively block the free exchange of ideas which should flourish in any school. These ambiguous and uncertain rules are invalid. Thus, a university rule prohibiting "misconduct" has been held void for vagueness.[55] In another case, a court held "unduly vague, uncertain and ambiguous" a dress code which provided that "students are to be neatly dressed and groomed, maintaining standards of modesty and good taste conducive to an educational atmosphere. It is expected that clothing and grooming not be of an extreme style and fashion."[56] In the Houston case, the only written rule which school officials could invoke against students for distributing their underground newspaper was as follows: "The school principal may make such rules and regulations that may be necessary in the administration of the school and in promoting its best interests. He may enforce obedience to any reasonable and lawful command."[57] The regulation was ruled "void for vagueness."[58] The court held that students are entitled to "a rule which is drawn so as to reasonably inform the student what specific conduct is prescribed."[59]

Often this infirmity of vagueness or overbreadth appears at the statutory level. The laws of many states allow suspension or expulsion from school for "misconduct," or where student conduct is not "in the best interests of the school." Where state laws are this vague, school officials ought to promulgate more narrow and specific rules defining "misconduct" and "best interests."[60] If they do not, both regulation and law should be challenged.[61] The most insidious situation of all occurs where there are no regulations at all, but school officials nonetheless punish students willy-nilly. Few censorship laws could be more chilling in their effect on free speech than an "unwritten code" proscribing any expression or activity which meets the arbitrary disapproval of an omnipotent school official. Students and lawyers should examine existing school codes, and where needed, obtain revisions so that they proscribe only specific, serious offenses or the alternative, the codes can be challenged in the courts.

5. A right to privacy in personal affairs

Inside and outside the school setting, the scope of an individual's right to privacy remains mostly undefined. The most frequent instances within school concern hair and grooming regulations. Many courts have found that the spirit of the first, ninth, and fourteenth amendments, when read together (that is, their penumbra), provides a basis for recognizing the right of the individual student to determine his own appearance; hair and grooming restrictions invade a sphere which is of a peculiarly personal and private nature, these courts say.[62] Just as many courts have said they do not.[63] The Supreme Court has refused to hear these cases, despite the eloquent objection of Justice Douglas, who found it shocking that school officials would attempt to control so personal a matter.[64] The student's right to keep his own personal space inviolate is likewise unclear. On one hand, a state court has ruled that a child has a cause of action for trespass against a teacher who searched his person on mere suspicion, or if the search was for the benefit of someone else (e.g., another child who alleged that a theft had taken place).[65] Likewise, the right to privacy has been extended to a student's living quarters so that the unwarranted search of a dormitory room would require the exclusion of illegally seized evidence in a criminal case.[66] At least one court has stated, "[U]niversity students are adults. The dorm is a home and it must be inviolate against unlawful search and seizure."[67] On the other hand, however, courts have been reluctant to extend this protection to the lockers of high school students, on the grounds that the lockers belong to the school, not the student.[68] Until decisions like these are reversed in the higher courts, students would be wise to treat their lockers as public rather than private places.

Intrusions into more personal matters (e.g., sexual behavior, family relations, pregnancy) most certainly seem invalid as an infringement of the right to privacy.[69] However, in view of the uncertainty of the case law in this area, a student facing punishment for his private, outside-of-school life should not rely solely on his right to privacy. Many such intrusions also violate the rule against unlawful regulations and the equal protection clause of the fourteenth amendment. Most cases upholding the rights of students who have children or who are married or pregnant or both have been decided on one of these two latter grounds.[70]

6. A right to procedural due process

The courts have uniformly held that the rudiments of due process are required before severe disciplinary action can be taken against a student. Generally, due process includes at least the right to advance notice of charges, and an opportunity to present a defense. A statement of minimum requirements was included in *Esteban v. Central Missouri State College.*[72] According to the court in *Esteban,* due process requires adherance to the following rules:

> (1) a written statement of the charges should be furnished prior to the date of a hearing; (2) a hearing should be conducted before the individual ultimately responsible for student conduct; (3) students should be permitted to inspect in advance any affidavits or exhibits which school officials intend to use at a hearing; (4) students should be afforded the right to present a defense to charges against them and to present affidavits, exhibits, and witnesses if they so desire; (5) students should be permitted to hear the evidence presented against them, and students should be allowed to question any witness who gives evidence against them; (6) the hearing officer should determine the facts of each case solely on the evidence presented at the hearing and should state in writing his finding as to whether or not the student charged is guilty of the conduct charged; (7) either side may, at its own expense, make a record of the events at the hearing.

The list in *Esteban* has been widely accepted by the courts. Unfortunately, some procedural safeguards which are available as a matter of course in a criminal or quasi-criminal proceeding were not mentioned. As a result, the courts seem to be splitting hairs in deciding such items as right to counsel in student disciplinary proceedings. The court in *Esteban* conceded that counsel should be present, but he was not to question witnesses, a task which was left to the student. In another case, where school officials had obtained a senior law student to "prosecute" other students, the court ruled that the accused students had a right to have counsel actively represent them.[73] Some courts have denied a right to counsel on grounds that proceedings were "investigatory" or "preliminary."[74] Others have found the outcome of very similar proceedings to be clearly punitive, however, and have upheld a student's right to counsel.[75] The Supreme Court in *In re Gault* ruled that a youth in juvenile court has a right to counsel, regardless of the noncriminal nature of the proceedings.[76] Given the very serious consequences of expulsion from school, legal scholars believe that *Gault* should logically be extended to school disciplinary proceedings where expulsion or long-term suspension may be an outcome.[77]

The privilege against self-incrimination has fared no better. There seems to have been only one case in which a court recognized the likelihood that school officials might intimidate students while investigating a situation.[78] A student's confession which is obtained by an insistent and overbearing school official cannot be trusted to be accurate. Even if the privilege against self-incrimination is not legally applicable in student disciplinary proceedings, officers hearing student disciplinary cases should give little weight to those confessions obtained from students before they have had an opportunity to consult with a lawyer or some other person. Nor should much weight be given to the argument that such techniques are not illegitimate because the aim is not punishment, but the gathering of information necessary to help the child.

Finally, almost no attention has been given to the situation where the same school officials act as victim, accuser, prosecutor, judge, jury, and jailer.[79] Even if due process were limited to criminal cases, the chances for bias and error in such proceedings should be examined. It may be a mistake to distinguish rules of due process simply because they were formulated in criminal cases. Where the rules were developed in an effort to maintain objectivity and aid in the search for the facts of a case, they must offer sound guidelines for student disciplinary proceedings as well.

Drafting a Code

When the time finally comes to sit down and draft a code, what should be done? First, it seems eminently sensible for school officials to encourage the students themselves to draft the code. They should have an opportunity to consult with teachers and lawyers, of course, and they should examine examples of codes from other jurisdictions. Student involvement at this initial, creative stage will foster a better understanding among students for the disciplinary process, and indeed, for the machinery of government. Since internally motivated discipline is likely to be the most durable and long-lasting, the student-drafted code is likely to be more effective than even the most elegantly-worded code imposed on students by school officials. The final result would not simply be a code: it would be an educational experience for students; it would give students a stake in the successful enforcement of the code; and it could promote good relationships between students and school officials, who are no longer viewed as arbitrary authoritarians.

Once the student drafters are assembled, the next logical step would be a survey of the law relating to students rights, with emphasis on the local jurisdiction. Lawyers could be most helpful at this stage. They can instruct the students on such items as the statutory grounds for expulsions or long-term suspensions and the nature of local judicial decisions. Depending on the state of the law locally, it may or may not be necessary to spell out certain rights. For example, in New York, the courts and the State Commissioner of Education have ruled against restrictive grooming codes, and knowledge of these decisions is widespread. Therefore, a general reference to constitutional rights is all that is necessary; a specific reference to hair length is unnecessary. On the other hand, if there is a widespread violation of specific rights, the code would help instruct teachers and administrators if it contained specific references to the invalid practice. In this situation, legal advisers to the students might supply annotations to be included in the code.

After this initial work has been done, students and their advisers can begin their drafting. Generally, the code should be simple and brief. If it is to serve well as an instructive device for students and school officials, it must be widely distributed; a single-sheet leaflet is an ideal size.

The code should contain three basic sections – (1) students' rights, (2) rules of conduct and sanctions for violations, and (3) hearing procedures.

The rights section would best begin with a very general statement about the applicability of state and federal constitutions. It seems advisable not to itemize these rights to avoid narrow interpretations which are limited to the official list. It might be helpful to refer to *Tinker* and similar cases; if desired, specific rights could be set forth as examples, or the code might provide that constitutional rights "include but are not limited to" those listed in the code. The code could also guarantee students' rights which they do not otherwise have. It could provide for an elected, representative government, and briefly describe the power and authority of this body. The student government might be given a voice in curriculum, extra-curricular programs, teacher evaluation, and disciplinary proceedings. Finally, reasonable-time-and-place regulations for the exercise of free speech rights without prior restraint – use of the school paper, bulletin boards, loud speakers, the school's p.a. system, hallways etc. – should be included.

Second, the code should specify which misdeeds will get students into what kind of trouble. Severe punishment (expulsion or long-term suspension) should always be limited to statutory grounds; these may be more narrow than state law, but may not be broader. Many educators feel that expulsion should never be used and long-term suspensions should be limited to a few specific occasions where the student's misconduct involved serious injury to persons or property and took place on school grounds or at a school-sponsored activity. The code might provide for short-term suspensions for specific disorderly acts which have created a "substantial disruption" at the school. Finally, it might allow teacher suspensions of not more than one-class hour for substantial disruptions in a single class. Even if the code is drafted by students, it must remain within the confines of the constitution of course. Vague statements should be avoided. Punitive action for speaking, writing or distributing literature is invalid. Therefore, the rules of conduct should forbid specific acts and no more.

Third, the code should state simply the required elements in a disciplinary hearing. The elements of due process discussed above should be present in any hearing where the student may be expelled or suspended for any length of time. Right to counsel should be recognized. The hearing board should be an impartial body which has not had prior contact with the matter before them. Preferably, the hearing board would include student representatives who were chosen in some fair and impartial manner.

In most situations, students will find some help in this task from at least a part of the adult world. In Seattle, the legal counsel to the school board requested students in the city's high schools to prepare the first draft of a code which the board finally adopted. Students and volunteer lawyers worked on the final version together and the city-wide student government retains the responsibility for recommending revisions in the code in the future. In Philadelphia, school officials encouraged students to participate in drafting a code in the aftermath of disorders at one of the city's schools. In New York City, a city-wide student organization drafted a code and successfully obtained approval from the board. In Boston, sporadic disorders in the schools led to student demands for a statement of rights in the school environment. At the suggestion of the school committee chairman, a task force is going through initial procedures of preparing such a statement.

When a good draft is ready, the code must be taken to the school board for approval. If the drafters have done their work well, they will have consulted frequently with the board's counsel and with as many board members as possible. Sympathetic teachers and administrators will also have been involved in the development of the code. If this preliminary politicking has been done, the chances for acceptance on the part of the board are much greater.

If early attempts to enlist the aid of school officials has failed, or if past experience indicates that seeking their cooperation would be futile, students seeking adoption of a code face a difficult path. They should consult with the lawyers advising them and enter into negotiations with the board. While the board has the power to approve or disapprove the code, the students have the power to bring suit, to appeal to the general public, or to seek support from specific organizations in the community. If the board is elected, the students could move into the political arena and work against the candidacy of the more recalcitrant board members. Whether members are elected or not, students can certainly unnerve them with their potential to organize a major effort to publicize their grievances. Board members who realize that students can take any or all of these actions will probably find themselves ready to negotiate with the students long before the students find it necessary to appeal to the public or the courts.

Copies of codes which are cited here and other examples of student codes are included in a codes packet, available on request by writing to the Center for Law and Education, Harvard University, 38 Kirkland Street, Cambridge, Massachusetts.

FOOTNOTES

1. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1966).
2. In *Butts v. Dallas Indep. School Dist.*, 306 F. Supp. 488 (N.D. Tex. 1969) the court distinguished *Tinker* on grounds that evidence of potential disruption justified the ban. In *Williams v. Eaton*, 310 F. Supp. 1342 (D. Wyo., 1970), the court did not even cite *Tinker, supra* note 1, let alone attempt to distinguish it. The court never reached the merits, but based its decision on lack of jurisdiction due to 1) conflict with the eleventh amendment, and 2) an insubstantial and speculative claim for damages. In so holding, the court ruled that it would violate freedom of religion provisions in the state and federal constitution to allow plaintiffs to protest in this way at a football game. The court cited only cases involving religion and not speech. The *Williams* case has been appealed, and a decision is expected soon.
3. *E.g., Kahl v. Breen*, 296 F. Supp. 702 (W.D. Wis.), *aff'd*, 419 F.2d 1035 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970); *Richards v. Thurston*, 304 F. Supp. 449 (D. Mass. 1969) (male hair length), *aff'd*, 424 F.2d 1281 (1st Cir. 1970); *Watson v. Thompson*, ___F. Supp.___(E.D. Tex. 1971) (39 LW 2394); *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970) (beard and mustache); *Dunham v. Pulsifer*, 312 F. Supp 411 (D. Vt. 1970) (barring long-haired male student from athletic activities not permissible); *Reichenberg v. Nelson*, 310 F. Supp. 248 (D. Neb. 1970) (hair or beard growth); *Sims v. Colfax Community School District*, 307 F. Supp. 485 (S.D. Iowa 1970) (hair length of female student); *Olff v. East Side Union High School District*, 305 F. Supp. 557 (N.D. Calif. 1969) (male hair length, court relied on free speech rights); *Westley v. Rossi*, 305 F. Supp. 706 (D. Minn. 1969) (male hair length); *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969) (same); *Hopkins v. Ayres*,___F. Supp.___, No. WC 6974-S (N.D. Miss. Oct. 25, 1969) (same); *Zachry v. Brown*, 299 F. Supp. 1360 (N.D. Ala. 1967) (same, equal protection grounds).
4. *E.g., Ferrell v. Dallas Indep. School Dist.*, 261 F. Supp. 545 (N.D. Tex. 1967), *aff'd*, 392 F.2d 697 (5th Cir. 1968) (2-1), *cert. denied*, 393 U.S. 856 (1968) (Douglas, Dissenting); *Griffin v. Tatum*, 425 F.2d 201 (5th Cir. 1970) (Court upheld lower court's finding that hair rule was unconstitutional as applied to plaintiff (boy with blocked hair) but overruled part of lower court decision invalidating entire regulation, leaving longer hair unprotected); *Davis v. Firment*,, 408 F.2d 1084 (5th Cir. 1969) (per curiam); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, ___U.S.___(1971); *Stevenson v. Wheeler County Board of Education*, 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir. 1970); *Lindsey v. Guillegeau*, F. Supp. (N.D. Ga. 1970); *Bishop v. Colaw*, 316 F. Supp. 445 (E.D. Mo. 1970); *Carter v. Hodges*, 317 F. Supp. 89 (W.D. Ark. 1970); *Farell v. Smith*, 310 F. Supp. 732 (D. Me. 1970); *Brownlee v. Bradley County*, 311 F. Supp. 1360 (E.D. Tenn. 1970) (no evidence to show the hair style in question conveyed an opinion); *Schwartz v. Galveston Independent School District*, 309 F. Supp. 1034 (J.D. Tex. 1970); *Giangreco v. Center School District*, 313 F. Supp. 776 (W.D. Mo. 1969); *Brick v. Board of Education*, 305 F. Supp. 1316 (D. Colo. 1969); *Crews v. Cloncs*, 303 F. Supp. 1370 (S.D. Ind. 1969).

5. Compare *Murphy v. Kerrigan*, civ. action no. 69-1174-W (D.C. Mass.) (consent decree) June 3, 1970 (forbidding corporal punishment in Boston) with cases cited note 11 *infra*.
6. See e.g., School District of Philadelphia, Bill of Rights and Responsibilities for High School Students, adopted Dec. 21, 1970; City School District of New York, Rights and Responsibilities of High School Students, Sept. 1970.
7. See, e.g. School District of Philadelphia, *supra*.
8. This was the "controlling premise" behind the promulgation of the 1965 University of Oregon Code, which began with the general policy that:

   > The University may apply sanctions or take other appropriate action only when student conduct directly and significantly interferes with the University's (a) primary educational responsibility of ensuring the opportunity of all members of the University community to attain their educational objectives, or (b) subsidiary responsibilities of protecting the health and safety of persons in the University community, maintaining or protecting property, keeping records, providing living accomodations and other services, and sponsoring non-classroom activities such as lectures, concerts, athletic events, and social functions.

   For a discussion, see Linde, *Campus Law: Berkeley Viewed from Eugene*, 54 *Calif. L. Rev.* 40, 67 (1966).
9. *Id.* at 52.
10. See *Indiana State Personnel Board v. Jackson*, 244 Ind. 321, 192 N.E. 2d 740 (1963); *Fertich v. Michener*, 111 Ind. 472, 14 N.E., 68 (1887); *Deskins v. Gose*, 85 Mo. 485 (1885). The School Board had a statutory duty to make rules, but did not. *Held*, the teacher may punish a child who starts a fight on his way home.

    The test has traditionally been whether a teacher's action was reasonable. In *Andreozzi v. Rubano*, 145 Conn. 280, 141 A.2d 638 (1968), the court held that a teacher may slap a student to restore order, but not to punish him, since the rules allowed only the principal to mete out corporal punishment.
11. In one federal district court case, the judges did acknowledge the wisdom and fairness of putting these rules in writing: "We strongly recommend that disciplinary rules and regulations adopted by a school board be set forth in writing and promulgated . . . ," but they upheld the expulsions of college students. *Zanders v. Louisiana State Board of Educ.*, 281 F. Supp. 747, 761 (W.D. La. 1968).
12. A copy can be found in *Linde, supra* note 8 at 67-73.
13. New York City Board of Education, Rights and Responsibilities of Senior High School Students, July, 1970.
14. School District of Philadelphia, Bill of Rights and Responsibilities for High School Students, Dec. 21, 1970, Section 6.
15. University of Oregon, Code of Student Conduct, Part I, sec. 6, as amended July 1, 1970, and part F, as amended March 4, 1970.
16. National Juvenile Law Center, St. Louis University, High School Disciplinary Statute, Feb. 12, 1971.
17. City-wide Youth Council of San Francisco, Student Rights and Responsibilities Manual for the San Francisco Unified School District, final draft (1971).
18. In addition, the authority of a private school to regulate student conduct may be based on a contractual theory. See *Robinson v. Miami*, 100 So. 2d 442 (Fla. App. 1958); *Carr v. St. John's University*, 17 App. Div. 2d 632, 231 N.Y.S. 2d 410 (1962). The contract terms may be found in bulletins and college catalogs. *Stein v. New York Educ. Comm'r*, 271 F.2d 13 (2d Cir. 1959). See also Comment, *Private Government on the Campus – Judicial Review of the University Expulsion*, 72 *Yale L.R.* 1362 (1963).
19. See Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 *U. Pa. L. Rev.* 373, 373-387 (1969).
20. ". . . the doctrine [of *in loco parentis*] is of little use in dealing with our modern 'student rights' problems." *Zanders v. Louisiana State Board of Educ.*, 281 F. Supp. 747, 756 (W.D. La. 1968) (college case). See also Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline* __ *Pa. L. Rev.* __ (1971) (to be published soon). See also *Breen v. Kahl*, 419 F.2d 1034, 1037-38 (7th Cir., 1969), *cert. denied*, 398 U.S. 937 (1970):

    > "Since the students' parents agree with their children that their hair can be worn long . . . in the absence of any showing of disruption, the doctrine of "in loco parentis" has no applicability.
21. See, e.g., *Matthews v. Board of Educ.*, 127 Mich. 530, 86 N.W. 1036 (1901) (striking down a school board requirement making vaccination a prerequisite to attending school in the absence of express statutory authority); *Rhea v. Board of Educ.*, 41 N.D. 449, 171 N.W. 103 (1919) (same); but cf. *Johnson v. Dallas*, 291 S.W. 972 (1927).
22. *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. R. 343, (1877) (dicta); *State v. Osborn*, 32 Mo. Op. 536 (1888).
23. *Mangum v. Keith*, 147 Ga. 603, 95 S.E., 1 (1918).
24. *State v. Board of Educ.*, 63 Wis. 234, 23 N.W. 102 (1885).
25. Opinion of the Deputy Attorney General to the Superintendent of Public Instruction Re Student Patrols, 11 Pa. Dist. and County Rep. 660 (1929).
26. *Commonwealth v. Johnson*, 309 Mass. 476, 35 N.E. 2d 801 (1941).
27. *Valentine v. Indep. School Dist.*, 191 Ia. 1100, 183 N.W. 434 (1921).
28. *Waugh v. Board of Trustees*, 23 U.S. 589 (1915).
29. *Hughes v. Caddo Parish School Board*, 57 F. Supp. 508 (W.D. La. 1945), *aff'd.* 323 U.S. 685 (1945).
30. *Wright vs. Board of Educ.*, 295 Mo. 466, 246 S.W. 43 (1922). But see *Coggins v. Board of Educ.*, 223 N.C. 763, 28 S.E. 2d 527 (1944).
31. It was cited in *Alvin Indep. School Dist. v. Cooper*, 404 S.W. 2d 76 (Tex. 1966) (exclusion of a mother of a child held *ultra vires*) and applied in *Sullivan v. Houston Indep. School Dist.*, 307 F. Supp. 1328, 1340, 1345 n.1 (S.D. Tex. 1969) held, off-campus activities in distributing underground paper are not within the reach of the school board.
32. However, the court permitted the school board to maintain a rule which barred married students from participation in extracurricular activities. *Board of Directors v. Green*, 259 Ia. 1260, 147 N.W. 2d 854 (1967).
33. For lawyers seeking case law and authority, a collection of recent case briefs on students rights is available from the center on request.
34. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1968). See also, e.g. *Scoville v. Board of Educ.*, 425 F.2d 10, 13 (7th Cir. 1970), *cert. denied*, __ U.S. __ (1971). *Dunham v. Pulsifer*, 312 F. Supp. 411, 417 (D. Vt. 1970); *Sims v. Colfax Community School Dist.*, 307 F. Supp. 485, 487 (S.D. Ia. 1970); *Sullivan v. Houston Indep. School Dist.*, 307 F. Supp. 1328, 1339 (S.D. Tex. 1969).
35. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, at 52 (1919) (Justice Holmes).
36. *Breen v. Kahl*, 419 F.2d 1034, 1036 (7th Cir. 1969), *cert. denied*, 398 U.S. 937.
37. *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 513 (1968). See also *Aguirre v. Tahoka Indep. School Dist.*, 311 F. Supp. 664 (N.D. Tex. 1970) (The wearing of brown armbands, even with a few incidents, was protected expression of dissatisfaction in the school's treatment of Chicanos). But

cf. Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970), where the court refused to extend *Tinker* to a case involving "aggressive violent demonstration." *Id.* at 1087.

38a *Panarella v. Birenbaum*, 60 Misc. 2d 95, 302 N.Y.S. 2d 427 (Sup. Ct. 1969).

38. *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir. 1970), *rev'g*, 286 F. Supp. 988 (N.D. Ill. 1968), *cert. denied*, ___U.S.___(1971); *Aguirre v. Tahoka Indep. School Dist.*, 311 F. Supp. 664 (N.D. Tex. 1970) (brown armbands were worn to express dissatisfaction with school policies); *Sullivan v. Houston Indep. School Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969).

39. *Eg. Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 511 (1968).

> "Students in school as well as out of school are persons under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress 'expressions of feelings with which they do not wish to contend.' "

Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970). Two high school students sold copies of their off-campus paper which contained critical remarks on school officials. The court held that "the reference undoubtedly offended and displeased the dean. But mere expressions of the students' feelings with which school officials do not wish to contend . . . is not the showing required by the *Tinker* test to justify expulsion." (Punctuation omitted.) *Id.* at 14. Some of the contents of the paper might also have been considered in poor taste. *Scoville* is a typical case where contents of speech disturbed school officials. See also, *Riseman v. School Committee*, ___F.2d ___(1st Cir. 1971); *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Sullivan v. Houston Indep. School Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969).

40. Cases cited note 39 *supra*. In *Riseman v. School Committee* ___F.2d___ (1st Cir., March 11, 1971), in upholding the right of students to be free of censorship of written materials prepared by them, the First Circuit ruled that, "no advance approval shall be required of the content of any such [student] paper . . . [or] any written forms of expressions." See also *Brooks v. Auburn University*, 412 F.2d 1171 (5th Cir. 1969), *aff'g* 296 F. Supp. 188 (M.D. Ala. 1969). The court enjoined university officials from barring a speaker who had been invited by a student organization. The lower court observed that "speech may not be restrained in advance except when there is a clear and unmistakable determination that the speaker will violate the law . . . *Id.* at 197. The circuit court agreed.

41. *De Anza High School Students Against the War v. Richmond Unified School Dist.*, N.D. Calif. No. 1074, 1971; *Mt. Edan High School Students Against the War v. Hayward Unified School Dist.*, N.D. Calif. No. 1173, 1971; *Rowe v. Campbell Union High School Dist.*, N.D. Calif. No. 51060, 1970; *O'Reilly v. San Francisco Board of Education*, N.D. Calif. No. 51427, 1970. The court struck down a state statute and local school board regulations prohibiting distribution of literature on school grounds. The school boards were directed to prepare new regulations governing first amendment regulations. (A copy of the new San Francisco regulation is included in the Student Codes Packet.) See also *Sullivan v. Houston Ind. School Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969). School officials attempted to expel two high school students for distributing "Pflashlyte," a newsletter which criticized school officials. They passed out copies in the halls of their school between classes, at a local shopping center and at other commercial establishments. There was some evidence that the newsletter disturbed the classroom in minor ways: students left copies in the wrong places and a few students were caught reading it during class. The Court ruled that 1) the school had no business attempting to regulate off-campus student activity and 2) the on-premises activities involved such little interference with the learning process that disciplinary action against the distributors was unwarranted.

42. *Eg. Sullivan v. Houston Ind. School Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969); *Scoville v. Board of Educ.*, 425 F.2d 10 (7th Cir. 1970), *cert. denied*, ___U.S.___(1971).

43. *Blackwell v. Issaquena County Board of Educ.*, 363 F.2d 749 (5th Cir. 1966). The court held that the wearing of "freedom," "SNCC" or "One Man One Vote" buttons was expression and protected under the first amendment. The court ruled in favor of students who had been disciplined for wearing such buttons. But see *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966). The court found that the button-wearing had produced serious disruption in the school and upheld the regulation.

44. *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503 (1968); *Aguirre v. Tahoka Ind. School Dist.*, 311 F. Supp. 664 (N.D. Tex. 1970); but see *Einhorn v. Maus*, 300 F. Supp. 1169 (E.D. Pa. 1969). Plaintiffs wore armbands bearing the inscription "humanize education" during graduation ceremonies. They were unable to obtain an injunction forbidding school authorities from recording this event in their school record and communicating it to colleges.

45. *Brooks v. Auburn University*, *supra*. *Stacy v. Williams*, 306 F. Supp. 963 (N.D. Miss. 1969), 312 F. Supp. 742 (N.D. Miss. 1970).

46. *Cf., Vought v. Van Buren Public Schools*, 306 F. Supp. 1388 (E.D. Mich 1969). A student was suspended for possession of admittedly obscene materials. The court held that the first amendment did not protect him, but after a hearing, the court overruled the suspension on due process grounds. At the hearing the student's lawyer produced materials from the school library – including an issue of Harper's Magazine and Salinger's *Catcher in the Rye* – which contained the same obscenity ("fuck"). The court could resolve the inconsistency and ruled for the student.

47. *Lee v. Board of Regents*, 306 F. Supp. 1097 (W.D. Wis. 1969), advertising space to publish views on Vietnam; *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969) (same).

48. *Sullivan v. Houston Ind. School Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969).

49. *Saunders v. Virginia Polytechnic Institute*, 417 F. 2d 1127 (4th Cir. 1969). The court held that denial of readmission to school because of participation in an orderly demonstration was unconstitutional.

50. See *eg. Esteban v. Central Mo. State College*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). The court held that the first amendment does not protect "actual or potentially disruptive conduct, aggressive action, disorder and disturbance, and acts of violence and participation therein . . . " *Id.* at 1087.

51. See *e.g. Shelton v. Tucker*, 364 U.S. 479 (1960). A state statute requiring teachers to disclose every organization they belonged to in the last five years was held unnecessarily broad in light of the purpose

served. See also *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. Little Rock*, 361 U.S. 516 (1960).

52. *Waugh v. Board of Trustees*, 237 U.S. 589 (1915) (*Held*, state may prohibit fraternities at a state university. Plaintiff who would not sign pledge could be refused admission); See also *Hughes v. Caddo Parish School Board*, 57 F. Supp. 508 (W.D. La. 1944), *aff'd*, 323 U.S. 685 (1945) (upholding state law prohibiting high school fraternities).

53. *ACLU of Va. v. Radford College*, 315 F. Supp. 893 (W.D. Va. 1970); The court granted declaratory relief to ACLU, which had been denied official recognition at the school. The court noted that the college recognized other political groups (The Young Republican Club and The Young Democratic Club) and found that non-recognition of ACLU violated the first amendment rights of students wishing to associate with ACLU.

54. *Healy v. James*, 311 F. Supp. 1275, 1281 (D. Conn. 1970).

55. *Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wis. 1968), *aff'd* 418 F.2d 163 (7th Cir. 1969).

56. *Crossen v. Fatsi*, 309 F. Supp. 114 (D. Conn. 1970).

57. *Sullivan v. Houston Ind. School Dist.*, 307 F. Supp. 1328, 1345 (S.D. Tex. 1969).

58. *Id.* at 1344-45.

59. *Id.* at 1344.

60. *Id.* at 1344-45. See also *Smith v. University of Tenn.*, 300 F. Supp. 777 (E.D. Tenn. 1969): The court ruled void as unduly vague and overly broad certain campus rules relating to outside speakers. The court also struck down a requirement that a speaker invitation and its timing must be "in the best interests of the University."

61. See e.g. *Snyder v. Board of Trustees*, 286 F. Supp. 927 (N.D. Ill. 1968). A three-judge court struck down as vague and overly broad an Illinois law which barred "any subversive, seditious, and un-American organization" from "the use of any facilities of the University for purpose of carrying on, advertising or publicizing the activities of such organization." See also *Dickson v. Sitterson*, 280 F. Supp. 486 (M.D. N.C. 1968) (same).

62. Cases cited note 3, *supra*.

63. Cases cited note 4, *supra*.

64. *Ferrell v. Dallas Indep. School Dist.*, 393 U.S. 856 (1968).

65. *Phillip v. Johns*, 12 Tenn. App. 354 (Ct. App. 1930).

66. *People v. Cohen*, 57 Misc. 2d 266, 292 N.Y.S. 2d 706 (Sup. Ct., 1968).

67. *Id.* at 57 Misc. 2d at 373, 292 N.Y.S. 2d at 713.

68. E.g., *People v. Overton*, 24 N.Y.2d 522, 249 N.E.2d 366, 301 N.Y.S.2d 479 (1969), *habeus corpus denied sub nom.*, *Overton v. Rieger*, 311 F. Supp. 1035, (S.D.N.Y. 1970) (appeal pending). Police detectives, under authority of a search warrant which was later found to be invalid searched a student's locker. In subsequent proceedings the youth moved to suppress evidence (marijuana) found there. The evidence was allowed to stand on the grounds that the principal of the school had authority to give, and did give permission for the search. The Supreme Court had remanded *Overton v. New York* 393 U.S. 85 (1968) for further consideration in light of *Bumper v. North Carolina*, 391 U.S. 543 (1968). The New York Court of Appeals adhered to its decision and found *Bumper* not applicable; See also *Kansas v. Stein*, 203 Kans. 638, 456 P.2d 1 (1969), *cert. denied*, 397 U.S. 947 (1970) (A principal opened a student's locker at the request of police; motion to suppress incriminating evidence denied); *In re Donaldson*, 269 Cal. App. 2d 509, 75 Cal. Rptr. 220 (Ct. App. 1969) (same).

69. See e.g. *Mindel v. U.S. Civil Service Commission*, 312 F. Supp. 485 (N.D. Calif. 1970). *Held*, termination of a postal clerk's appointment because he was living with a woman violates his right to privacy.

70. E.g., *Alvin Ind. School Dist. v. Cooper*, 404 S.W.2d 76 (Tex. 1966) (exclusion of mothers, *held ultra vires*); *Ordway v. Hargraves*, civ. action No. 71-540-C (D. Mass. Mar. 11, 1971) (39 L. Week 2551) (exclusion of unmarried pregnant girl); *Johnson v. Board of Educ.*, Court order, civ. action No. 172-70 (D.N.J., April 16, 1970); (*held*, violation of their right to equal protection to forbid married students to participate in extra-curricular activities); *Perry v. Grenada Municipal Separate School Dist.*, 300 F. Supp. 748 (W.D. Miss. 1969), (No rational basis for excluding students solely on the grounds that they were unwed mothers); *Board of Educ. v. Bentley*, 383 S.W.2d 677 (Ky. 1964) (*held*, "unreasonable and arbitrary" to require married students to withdraw from school for at least one year).

71. *Esteban v. Central Mo. State College*, 277 F. Supp. 649 at 651-52 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). *Accord Woods v. Wright*, 334 F.2d 369 (5th Cir. 1964); *Vought v. Van Buren Public Schools*, 306 F. Supp. 1388 (E.D. Mich. 1969); *Sullivan v. Houston Indep. School Dist.*, 307 F. Supp. 1328 (S.D. Tex. 1969); *Knight v. Board of Educ.*, 48 F.R.D. 108 (E.D.N.Y. 1969).

72. *Esteban v. Central Mo. State College*, 277 F. Supp. 649; *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

73. *French v. Bashful*, 303 F. Supp. 1333 (E.D. La. 1969).

74. *Madera v. Board of Educ.*, 386 F.2d 778 (2d Cir. 1967), *rev'g*, 267 F. Supp. 356 (S.D.N.Y. 1967), *cert. denied*, 390 U.S. 1028 (1968) (no right to counsel in guidance conference); *Barker v. Hardway*, 283 F. Supp. 228, 238 (S.D. W.Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 905 (1969) (no right to counsel in a hearing before an "advisory" and "investigation" body).

75. *Geiger v. Milford Indep. School Dist.*, 51 D. & C. 647 (Pa. County Ct. 1944) (expulsion); *Goldwyn v. Allen*, 54 Misc.2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967). In *Goldwyn*, the State Department of Education barred a student from participation in the Board of Regents examination (prerequisite to a state diploma, and to gaining scholarships and university admissions) on receipt of a letter from an acting principal that the student had cheated in one of the examinations. There was a review of the matter later by the assistant superintendent of the district. Counsel was not allowed to participate. The court ordered the student reinstated, and her record expunged, because among other reasons, counsel was denied at a punitive hearing.

76. *In Re Gault*, 387 U.S. 511 (1967).

77. See Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, *Pa. L. Rev.* (1971).

78. See *Goldwyn v. Allen*, 54 Misc.2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967).

79. This issue came up in *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967). The court held that a cadet had a right to challenge the composition of a panel which decided to expel him, to show possible bias. An academy regulation required that members of the panel be free of prior connections with the case. But see *Jones v. Tennessee Board of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. granted*, 396 U.S. 817 (1969), *writ dismissed as improvidently granted*, 397 U.S. 31 (1970) (Justices Douglas and Brennan, dissenting). Two members of the faculty advisory group who adjudicated the case testified against the students. The court ruled that this "in itself" was not sufficient to constitute a denial of due process. *Id.* at 200. Cf. *Pickering v. Board of Educ.*, 391 U.S. 563, 578 n. 2 (1968) (dictum) (teacher dismissal).

IV. MARRIAGE AND PREGNANCY

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

STEPHEN JOHNSON, individually and as husband and next friend of PAULA JOHNSON, Plaintiffs,	:	Civil Action No. 172-70
vs.	:	
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, New Jersey, et al., Defendants.	:	

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

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STATEMENT OF FACTS

Plaintiffs, Paula and Stephen Johnson, were married on the 8th day of July, 1967. They are now parents of a male child. Paula Johnson was then and is now a student at Paulsboro High School, Paulsboro, New Jersey. Said school is subject to the rules and regulations of the Paulsboro Board of Education. On or about the 27th day of October, 1964, said Board adopted the following rule:

> Policy #5131: Married Students
>
> Any married student or parent shall be refused participation in extra-curricular activities. When a student marries he assumes the responsibilities of an adult and thereby loses the rights and privileges of a school youngster.
>
> This regulation regarding extra-curricular activities shall not be construed to interfere with a married student continuing his education.

Pursuant to said rule, Paula Johnson has been denied permission to participate in the High School athletic program and forthcoming senior class trip to Washington, D. C. On the 10th day of December, 1969, she received a letter from defendant Stouffer regarding said Policy, restating to her its prohibition of her desired participation in said activities. On the 11th day of February, 1970, plaintiffs filed the instant complaint with this court. Defendants' timely answer was received on the 9th day of March, 1970.

QUESTIONS PRESENTED

Whether Policy #5131 and defendants' actions pursuant thereto are invidiously discriminatory and deprive plaintiffs of rights guaranteed by the equal-protection clause of the Fourteenth Amendment.

Whether Policy #5131 and defendants' actions pursuant thereto are unreasonable and deprive plaintiffs of rights guaranteed by thefreedom of speech and assembly clause of the First Amendment.

Whether Policy #5131 and defendants' actions pursuant thereto are unreasonable and deprive plaintiffs of rights guaranteed by the due process clause of the Fourteenth Amendment and the penumbra of civil liberties guaranteed to the people by the Ninth Amendment.

* * *

III

POLICY #5131 AND DEFENDANTS' ACTIONS PURSUANT THERETO HAVE DENIED PLAINTIFF THE EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT

The instant policy and practice of the Paulsboro school officials are patently discriminatory. Students who happen to marry or have children prior to graduation compose the subjected class and, as members of said class, they are presently deprived of the right to participate in the entire scope of Paulsboro's extra-classroom program. At present this includes such activities as sports, clubs and overnight trips. The discriminatory nature of this prohibition can hardly be questioned. Two classes of students now attend the Paulsboro school system: those who are married or are parents and those who are single and childless. Both groups may attend class but only the latter may benefit from extra-classroom activities. Plaintiff Paula Johnson is twice damned: being both married and a parent she is clearly subject to the penalties of Policy #5131 and, consequently, defendants have taken action to see that she does not engage in sports and does not go with her friends on the annual Washington trip.

It is clear that the public education opportunities provided by the state "must be made available to all on equal terms." Brown v. Board of Education, supra, 347 U.S. at 493. Classifications which deny educational benefits to some while providing it to others raise serious questions concerning the motivation of the local school officials.

> (W)here fundamental rights and liberties are asserted under the Equal Protection Clause, classification which might invade or restrain them must be closely scrutinized and carefully confined. Harper v. Virginia Board of Elections, 383 U.S. 663, 668, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (striking down a Virginia poll tax as invidiously discriminatory).

Although on its face the equal protection clause appears to bar all discrimination in the enforcement and operation of laws and regulations, only "invidious" discrimination is prohibited by the courts. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1965) (statute regulating medical care of vision). The test of "invidiousness" in the area of school law has been articulated above: the discriminatory classification must be reasonably tied to the "maintenance of order and discipline within the educational system." Burnside v. Byars, supra, 363 F.2d at 748. It must be based on some educational purpose or need. It may properly rest on health needs, discipline or order. Thus in Brick v. Board of Education, supra, 305 F.Supp. at 1321, the court sustained a code regulating hair style because of the "substantial evidence that long hair tended to disrupt school activity and distract students and teachers." In Olff v. East Side Union High School, supra, 305 F.Supp. at 559, no evidence being introduced that "plaintiffs' hair style is either a health or safety menance to either himself or other members of the school community," the prohibition was enjoined. See also, Westley v. Rossi, supra, 305 F.Supp. at 713.

The New Jersey legislature has carefully limited the discretion of local boards to circumvent the right to public education. Expulsion and suspension are permitted only in extremely narrow circumstances. Pursuant to N.J.S.A. 18A:40-7 a student may be barred from school for reasons of health. Pursuant to N.J.S.A. 18A:37-2 a student may be barred from school for engaging in particular kinds of conduct which may be best summarized as conduct which would effectively disrupt the education process. With the exception of these grounds, the New Jersey Constitution has mandated that public education be available to all children between the ages of five and eighteen. New Jersey Constitution, Art. 8, §4, para. 1.

1. Right v. Privilege:

Although Brown v. Board of Education, supra, 347 U.S. at 493 has mandated that educational opportunity be equally provided, it has been argued that extra-classroom activities are not part of the educational process; that is, that they are a privilege, and therefore may be dispensed at the discretion of the school officials without regard to constitutional mandates. The argument has prevailed in ~~five~~ six of the ~~six~~ seven states which have reviewed regulations similar to the instant Policy #5131. State ex rel. Indiana High School Athletic Association v. Lawrence Circuit Court, 240 Ind. 114, 162 N.E. 2d 250 (1959); Kissick v. Garland Independent School District, 330 S.W.2d 708 (Civ. App., Tex.1959); Cochrane v. Board of Education of Mesick Consolidated School District, 360 Mich. 390, 103 N.W.2d 569 (1960) (here the court split

4-3 against the regulation); State ex rel. Baker v. Stevenson, 27 Ohio 223, 189 N.E.2d 181 (C.P. Ohio 1962); Starkey v. Board of Education of Davis County School District, 14 Utah 2d 227, 381 P.2d 718 (1963); ~~and~~ Board of Directors of the Independent School District of Waterloo v. Green, 259 Iowa 1260, 147 N.W. 2d 854 (1967); and Estay v LaFouche Parish School Board. 230 So.2d 443 (La. Ct. of App., 1969)

~~Six, Five~~ Six of the cases held that regulations similar to Policy #5131 were valid. The sole exception is Cochrane v. Board of Education, supra, where the court split 4-3 on the validity of the regulation (the majority held it invalid) but an eighth judge thought the issue moot. Thus, the court was divided and technically upheld a lower court ruling which sustained the regulation. It should be noted that in none of the above cases were the constitutional arguments presented herein seriously considered, and all of them were decided prior to the Supreme Court's decision in Tinker v. Des Moines Independent Community School District, supra.

Every case cited recognized that a school board may not arbitrarily prevent a student from attending school; that is, students had a "right" to education which extended, at least, to scholastic activities and, therefore, students who are married or have children could not be deprived of that "right." That is, for the purpose of deciding who should or should not be admitted to the public educational system, it would be arbitrary and invidiously discriminatory to deny admission to students solely on the basis of their marital or parental status. It is certain that no state policy has been recognized which would permit school officials in their discretion to completely bar students who marry or have children from school. However, these courts believed that the "right" to public education did not extend to participation in extra-classroom activities. Thus, enjoyment of extra-classroom activities was a "privilege" dispensed *at the discretion* of the local school board which could, within reason, discriminatorialy dispense said "privilege." Accepting the right/privilege dichotomy, the courts were then willing to justify barring such students from extra-classroom activities for reasons which they simultaneously refused to accept as justification for completely barring them from all school activities. *State ex rel. Indiana High School Athletic Association v. Lawrence Circuit Court*, supra, 162 N.E.2d at 253-254; *Kissick v. Garland Independent School District*, supra, 330 S.W. 2d at 711-712; *Cochrane v. Board of Education of Mesick Consolidated School District*, supra, 103 N.W. 2d at 580, 583; *State ex rel. Baker v. Stevenson*, supra, 184 N.E. 2d at 188 (ruling limited to inter-scholastic sports); *Starkey v. Board of Education of Davis County School District*, supra, 381 P.2d at 721; *Board of Directors of the Independent School District of Waterloo v. Green*, supra, 147 N.W. 2d at 860.

The heavy reliance on the right/privilege dichotomy is well illustrated by the following wording in the *Starkey* case which was quoted verbatim and heavily relied upon in *Green*. The court distinguished scholastic from extra-classroom activity and said of the student involved:

> (H)e has no right to compel the Board of Education to exercise its *discretion* to his personal advantage so he can participate in the named activities. *Starkey v. Board of Education of Davis County School District*, supra, 381 P.2d at 721, *Board of Directors of the Independent School District of Waterloo v. Green*, supra, 147 N.W. 2d at 860. (emphasis supplied).

When viewed as a "right," education is mandatory and the local Board of Education has no "discretion" to deny it except for reasons of health or disturbance. When viewed as a "privilege," the Board's discretion is invoked and may be questioned only if exercised arbitrarily, capriciously or unreasonably. This would seem to be the rule of the above-cited cases. It seems that the Constitution, although not stopped at the schoolhouse gate, may only come in part of the way. Extra-classroom activities allegedly are not covered by that document. This distinction completely disregards the fact that like scholastic activities, extra-classroom activities are funded by the state by means of its taxing power as a significant aspect of the educational process. Furthermore, it fails to take into account the fundamental importance of such activities to a well-rounded educational experience. It is no longer the view that education is adequately dispensed in the class-room environment.

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Whatever the policy in the states referred to above and whatever the value of the right/privilege dichotomy where constitutional freedoms are involved, the issue is clearly moot in the State of New Jersey. New Jersey's policy with regard to scholastic and extra-classroom activities has been clarified by the Commissioner and the State Board: both are on equal footing, both are equally important and essential to public education, and students have a "right" to both. New Jersey law here is not presented in support of a state ground for relief. It is offered as highly persuasive authority for the view propounded by plaintiffs and seemingly rejected by the Paulsboro Board; that is, that extra-classroom activities are of utmost importance to a well-rounded public education and may not be flippantly curtailed at the whim of the local school board merely at the insistence of some area parents.

2. Policy of the State of New Jersey:

The supreme administrative authority in New Jersey with control over the public education program is the State Board of Education, N.J.S.A. 18A:4-1. The State Board has general supervisory and rule-making powers and is charged with the maintenance of a "unified, continuous and efficient" educational program. N.J.S.A. 18A:4-10, 15, and 16. The Commissioner of Education, working directly under the State Board, supervises all of the public schools in the state. N.J.S.A. 18A:4-23. The decisions of the Commissioner and the State Board establish state policy in educational matters and control the local boards. New Jersey state policy with regard to the importance of extra-classroom activities has been carefully spelled out in detail by the Commissioner and the State Board of Education. In Willett v. Board of Education of the Township of Colts Neck, 1966 S.L.D. 202 (Comm'r 1966), aff'd by the New Jersey State Board of Education (slip opinion April 3, 1968), the Commissioner analyzed the importance of "field trips" to the educational process:

> Teaching is more effective and learning is enhanced when it is not confined to actions within the class-room and the school building but moves out into the child's environment and employs actual observation and experience to supplement and enrich class procedures.... (A) field trip is, or should be, a vital learning experience, planned, carried out, and followed up as an integral part of the course of study with clearly understood objectives in terms of learning... It is the classroom made mobile. Willett v. Board of Education of the Township of Colts Neck, supra, 1966 S.L.D. at 205.

In Smith v. Board of Education of the Borough of Paramus, (slip opinion of the Comm'r March 28, 1968), aff'd by the N.J. State Board of Education (slip opinion February, 1969) the Commissioner said:

> In pursuit of the goal of the highest degree of self-realization possible for each individual, the schools have traditionally sought an even greater diversity than is provided by formal classroom learnings. Thus, they have provided opportunities for a wide variety

> of extra-classroom activities in which pupils are encouraged to explore and pursue individual interests. Historically these pursuits became known as "extra-curricular," unfortunately connoting something which was tacked on and of minor importance compared with the classroom teaching program. Later, resort was had to use of the term "cocurricular" in an effort to establish the parallel significance of these curricular elements. The semantics are of no moment. ...school affairs such as dances, concerts, dramatic productions, athletic events and the like, although generally referred to as "extra-curricular" were better designated as "extra-classroom," and are certainly part of the total curriculum. Smith v. Board of Education of the Borough of Paramus, supra, at page 6 of the slip opinion. (emphasis supplied).

It is clear that in the eyes of the Commissioner and the State Board, discrimination as to "extra-classroom" activities is as undesirable as discrimination as to scholastic activities. The Paulsboro Board might just as well prevent Paula Johnson from taking English or Mathematics.

The Commissioner went on to underscore the basic policy of the State of New Jersey:

> The existence of a broad and well developed program of student activities is an essential factor in the approval or accreditation of any secondary school. Smith v. Board of Education of Borough of Paramus, supra, at page 7 of the slip opinion.

He referred to Evaluation Criteria (1960 edition of the National Study of Secondary School Evaluation) which establishes the basic criteria for accreditation of New Jersey schools by the Middle Atlantic States Association of Colleges and Secondary Schools and which clearly outlines the policy of educators in the field of secondary education:

> The school provides for two general kinds of educational experience, the regular classroom activity and those called extra-curricular or cocurricular. Together they form an integrated whole aimed toward a common objective. Evaluation Criteria, supra, at 241; as quoted in Smith v. Board of Education of the Borough of Paramus, id (emphasis supplied).

The Commissioner added the following words:

> In the Commissioner's judgment, therefore, boards of education are not only permitted under the law, but have an affirmative duty and responsibility to develop a broad program of pupil activities beyond formal classroom instruction as an essential part of the curriculum offered. Smith v. Board of Education of the Borough of Paramus, supra, at 7-8 of the slip opinion.

It is clearly the manifest policy of the State of New Jersey that the concept of "free public education" connotes both classroom and extra-classroom activities and that pupils, having the right to one, have the right to both. There can be no reasonable basis for distinguishing between the two. Just as marriage per se could not be sufficient grounds to bar Paula Johnson from her English class, so it cannot be grounds to bar her from visiting the Nation's Capitol on a field trip sponsored by her school. The Consitutional mandate of public education for all includes the right to participate in all school activities.

The right/privilege dichotomy cannot be seriously argued. Certainly in providing for non-segregated educational facilities in Brown, the Supreme Court would not have tolerated segregated extra-classroom activities in integrated schools. Monroe v. Board of Commissioners, City of Jackson, Tennessee, 244 F.Supp. 353, 364-365 (W.D.Tenn. 1965), modified, 269 F.Supp. 758 (W.D.Tenn. 1965), aff'd and remanded on other grounds, 380 F.2d 955 (6th Cir. 1967), vacated on other grounds, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed. 2d 733 (1968). Once the schoolhouse gate is open to the Constitution, it must be open all the way.

IV

POLICY #5131 AND DEFENDANTS' ACTIONS PURSUANT THERETO HAVE DENIED PLAINTIFF THE RIGHT TO FREE EXPRESSION AND ASSOCIATION IN VIOLATION OF THE FIRST AMENDMENT

However, the most insidious aspect of Policy #5131 has not yet come to light. For whatever reason it was passed, it clearly and undeniably is an attempt to curtail and severely inhibit Paula Johnson from engaging in free discussion and association with her fellow students while joining with them in extra-classroom activities.

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. Tinker v. Des Moines Independent Community School District, supra, 393 U.S. at 506.

The First Amendment deprivation herein is far more serious than that confronted by the Supreme Court in Tinker where the students had been prohibited from wearing black armbands. Here there is a determined effort to deprive Paula Johnson of the most fundamental aspect of First Amendment protection: the right to merely associate with her friends in normal school activities. The idea that she carries with her some sort of infectious moral disease is wholly unfounded in fact and clearly contrary to law. The biases and prejudicies of some parents must not be permitted to work an extreme hardship on the children of our society. The belief that Paula will in some way "infect" or "pollute" her fellow students is a clear manifestation of a warped morality. The clinical and ecological analogies are not exaggerated and should indicate the overkill effect such a regulation has on the students which it condemns. They become isolated from their friends and classmates. In a very real sense they are marked individuals bearing the curse of Cain in and out of class. The school board must not be permitted to gloss over the true significance of Policy #5131. It is clearly an attempt to keep Paula Johnson from even the most casual conversation and association. Once she is permitted to attend school, Paula must not be given second-class status. Such a policy undercuts our fundamental notions of proper school environment.

In Burnside v. Byars, supra, the court said, that:

> (S)chool officials cannot ignore expression of feelings with which they do not wish to contend. They cannot infringe upon their students' right to free and unrestrained expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operations of the school. Burnside v. Byars, supra, 363, F.2d at 749.

If the school wishes to point out to students the difficulties of teen-age marriage or parenthood, it may do so within the traditional confines of the educational process.

> (T)here is still a difference, for example, between conducting a course in "Marriage and Family Living," in which the dangers of teen-age marriage are discussed and even inveighed against, and excluding married students from school or from extra-curricular activities as a means of inducing the other pupils to believe that teen-age marriage is undesirable. Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-Constitutional Analysis," 117 U.Pa. L.Rev. 373, 391 (1969).

The imposition of the peculiar moral values of an ever-changing local school board upon the student body of its school system can hardly be tolerated where such imposition results in both a serious deprivation of education experience and a blatant curtailment of speech and association, especially where neither school discipline nor disruption is threatened and no educational purpose is served. If the Paulsboro School Board is truly concerned with student marriage or parenthood it may use the very tools which our educational system purports to foster: discussion, learning and teaching. Where school discipline and disruption are not threatened, no reason, constitutionally entertainable, can be offered for disregarding such fundamental educational tools for the perpetration of purely moral values. See Tinker v. Des Moines Independent Community School District, supra, 393 U.S. at 509-511; West Virginia State Board of Education v. Barnette, supra, 319 U.S. at 632-633 (enforced flag salute invalid but mandatory course in civics clearly would have been permissible.

As early as 1929, the Supreme Court of Mississippi firmly rejected the notion that a child would be barred from school solely because of marriage. McLeod v. State ex rel. Colmer, 154 Miss. 468, 122 So. 737 (1929). The Court's words should have been noted by the Paulsboro Board:

> When the relation (marriage) is entered into with correct motives, the effect on the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefited instead of harmed. And, furthermore, it is commendable in married persons of school age to desire to further pursue their education, and thereby become better fitted for the duties of life. McLeod v. State ex rel. Colmer, supra, 122 So. at 738-739.

V

POLICY #5131 AND DEFENDANTS' ACTIONS PURSUANT THERETO HAVE DENIED PLAINTIFFS' FUNDAMENTAL RIGHTS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND THE PENUMBRA OF CIVIL LIBERTIES RESERVED TO THE PEOPLE BY THE NINTH AMENDMENT

Defendants have asserted that Policy #5131 is a "moral" matter passed at the request of area parents not to have their children engage in extra-classroom activities with students who marry or have children. But it is impossible to distinguish participation in extra-classroom activities from participation in classroom activities. Defendants admit that the Washington trip and extra-curricular sports are carefully supervised. No rational, let alone reasonable, distinction has been offered to distinguish between curricula and extra-classroom activities. The court might well take note that for a student from a proverty background, a trip to the Nation's Capitol might well be exceedingly more valuable than any number of hours and days spent in a History or civics classroom. Surely their desire to keep Paula out of school altogether would not be honored. On what basis then should their desire to keep her home while her friends go to the Nation's Capitol or their desire to keep her out of extra-classroom sports be honored?

It may be argued that teen-age marriages are disfavored and not to be encouraged and that other students must be shielded from the influence of students who marry or become parents. See State ex rel. Indiana High School Athletic Association v. Lawrence Circuit Court, supra, and other cases cited. Plaintiffs contend that if this is not a sufficient ground to bar such students from public school, then it is not a sufficient ground to discriminate against them once they are in school. Regardless, plaintiffs argue herein that said ground is entirely unrelated to any educational purpose and is not sufficient to warrant discrimination in educational opportunity. Furthermore, plaintiffs argue that the right not to be discriminated against because of marital or parental status with regard to educational opportunity is a fundamental right protected by the due process clause of the Fourteenth Amendment and the decision whether to take part in such a program is a right reserved to the plaintiff by the Ninth Amendment.

The so-called "disfavor" with which the state views teen-age marriages is not a legal concept. In New Jersey it has reached judicial cognizance only in terms of a permissive attitude toward granting annulments. In Re Anonymous, 32 N.J. Super. 599, 108 A.2d 882 (Super. Ct., Ch. 1954); Wilkins v. Zelichowski, 26 N.J. 370, 140 A.2d 65 (1958); B -aka-L v. L, 65 N.J. Super. 368, 168 A.2d 90 (Super. Ct., Ch. 1961).

By statute, New Jersey permits males under 21 and females under 18 to marry with the consent of their parents or guardians. Males under 18 and females under 16 must also obtain the consent of court. N.J.S.A. 37:1-6. Permissive nullity is recognized where such a marriage has taken place and the party who was then underage did not subsequently "ratify" it or "confirm" it upon reaching the age of eighteen. N.J.S.A. 2A:34-1. It should be pointed out that plaintiff Stephen Johnson is now over 21 Paula Johnson is now over 18. No New Jersey law or policy looks with disfavor on their marriage. They have been happily married for over two years. Of utmost importance and significance is the fact that they have done absolutely nothing illegal. Paula Johnson is being clearly discriminated against as a result of her legal actions.

This is not a case where a student has committed a crime, is dangerous to his fellow students, is sick or infirm. Paula simply wishes to engage in normal relations with her friends. She wishes to enjoy the full benefits of the educational experience provided by the Paulsboro public school system. Surely a trip to the Nation's Capitol, a visit to the Congress, White House, Federal Bureau of Investigation, Lincoln and Washington monuments is of significant educational import. Surely the experience of extra-classroom sports activities, of learning to deal in a proper and honest way in competitive enterprises is of significant educational import. It can hardly be argued that plaintiff Paul Johnson is an insidious force in the Paulsboro High School which must be carefully watched and kept from her fellow students.

Yet she is being treated as such. This can only have a deleterious effect on her relations with those students, her education and, most importantly, her marriage itself.

The argument that this is for her own good is also specious. In the first place, it assumes that extra-classroom activities are less important than classroom activities, an opinion not shared by the State Board of Education or the New Jersey Commissioner of Education. Secondly, it assumes that Stephen and Paul Johnson should not be allowed to make this decision for themselves.

This invades the zone of marital privacy protected by the Constitution. Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (Conn. 1965).

> We deal with a right of privacy older than the Bill of Rights... . Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. Griswold v. Connecticut, supra, 381 U.S. at 486.

Surely the preemption by the Paulsboro School Board of a decision best left to the Johnsons is an invasion of the privacy of their marital relationship. The Policy says that by marrying the student "assumes the responsibility of an adult." Unless the board is being facetious, it would seem the decision to go on the Washington trip or take part in sports activities is one which the Johnsons are clearly responsible to make.

It is difficult to calculate the harm caused to Paula Johnson by reason of the board's regulation. She is partially isolated from her peer group, left to receive a second-rate educational experience and forced to view her own marital relationship as an encumbrance on her educational opportunities and friendships. The Paulsboro Board has perverted the [redacted] [redacted] sanctity of the marital act by relegating it to an occurrence subject to punishment, resulting in partial isolation and exclusion. This is clearly unconstitutional.

CONCLUSION

For the above stated reasons plaintiffs argue that Policy #5131 and defendants' actions pursuant thereto are in violation of the First, Ninth and Fourteenth Amendments to the Constitution of the United States and, therefore, pray that this court:

1. delcare that said Policy #5131 is void as unconstitutional;

2. enjoin defendants from taking any actions pursuant to said Policy;

3. enjoin defendants from taking any actions which would in any way limit plaintiff Paula Johnson from participating in extra-classroom activities at Paulsboro High School by reason of her marital and/or parental status;

4. grant all other relief as may be necessary and proper to an equitable adjudication of this action; and

5. award plaintiffs the costs of this action.

Respectuflly submitted,

On the Brief:
Carl Stephen Bisgaier,
Esq.

DAVID H. DUGAN, III, DIRECTOR
CAMDEN REGIONAL LEGAL SERVICES, INC.
Attorney for Plaintiffs

By: Fred W. Schmidt Jr
Fred W. Schmidt, Jr.
Of Counsel

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF NEW JERSEY

STEPHEN JOHNSON, individually and as husband and next friend of PAULA JOHNSON,	
Plaintiffs,	Civil Action 172-70
vs.	ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, etc., et al.,	
Defendants.	

This matter having been opened to the Court by plaintiffs' on motion for summary judgment and defendants' having been heard on cross-motion for summary judgment, Carl S. Bisgaier, Esquire, of counsel to David H. Dugan, III, Director, Camden Regional Legal Services, Inc., appearing on behalf of plaintiffs, and Eugene P. Chell, Esquire, of Falciani, Cotton, Chell and Stoinski, appearing on behalf of the defendants, and all facts necessary to the determination of these motions having been stipulated by the parties hereto, the Court having found that there is no genuine issue as to any material fact, that plaintiffs are entitled to a summary judgment as a matter of law and that, as a matter of law, defendants' cross-motion for summary judgment should be denied, IT IS on this the 11th day of April, 1970, ORDERED that:

1. this Court has jurisdiction over this action;

2. that Policy #5131 of the Board of Education of the Borough of Paulsboro, of the State of New Jersey, entitled

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"Married Students", which was revised and adopted by said Board on the 27th day of October, 1964, is hereby declared to be in derogation of the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States and is, therefore, unconstitutional, illegal and void;

3. that the defendants, who are charged with the enforcement of the provisions of the aforesaid policy, their representatives, agents, employees and successors are hereby permanently enjoined and restrained from taking any action pursuant to said policy; and

4. that the defendants, who are charged with the enforcement of the provisions of the aforesaid policy, their representatives, agents, employees and successors are hereby permanently enjoined and restrained from discriminating against students as to participation in extra-curricular activities solely on the basis of said students' marital and/or parental status~~, and~~ ...

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CLYDIE MARIE PERRY, et al.,

Plaintiffs,

-vs-

THE GRENADA MUNICIPAL SEPARATE
SCHOOL DISTRICT, et al.,

Defendants.

CIVIL ACTION

NO. WC 6736

PLAINTIFFS' TRIAL MEMORANDUM IN SUPPORT OF THE COURT'S JURISDICTION AND FOR PERMANENT INJUNCTIVE RELIEF

PAUL BREST
REUBEN V. ANDERSON
538 1/2 North Farish Street
Jackson, Mississippi 39202

JACK GREENBERG
JAMES N. FINNEY
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

STATEMENT

On or about September 6, 1967, plaintiff Clydie Marie Perry attempted to register to attend the eleventh grade at a school maintained by defendants. Her admission was refused on the ground that she was the mother of an illegitimate child. An appeal was made on behalf of plaintiff to the superintendent of schools. By letter dated September 13, 1967, the superintendent, on behalf of the Board of Trustees of the school district, informed plaintiff that her exclusion from school was permanent, for the reason she had been given, and was consistent with long-standing policy.

A complaint on behalf of plaintiff was filed in this Court seeking declaratory and injunctive relief on the grounds, inter alia, that the school board's policy of automatic and permanent exclusion of unwed tennage mothers violates the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Defendants' answer was duly served and filed on September 23, 1967.

On October 9, 1967, a hearing was held in this Court on plaintiff's motion for a preliminary **injunction**. Prior to the commencement of that hearing on motion, a second unwed teenage mother, Emmas Jean Wilson, was added as a plaintiff in this action.

On December 21, 1967, this Court, per Judge Clayton, sitting by special designation as District Judge, issued an opinion and order denying plaintiffs' motion for preliminary injunction. However, the Court retained jurisdiction of the case in order that it might ultimately be "fully litigated on a more complete record and the rights of the parties determined in a more complete and permanent way."

SUMMARY OF THE EVIDENCE

The Board's Disciplinary Policy

It is the long-standing policy of the defendant board that a girl who has an illegitimate child is automatically and permanently excluded from attending any school in the district. No hearing or interview is conducted prior to the execution of this discipline. The board makes no effort to determine whether the father of the illegitimate child of a teenage girl is a student in one of the schools of the district, and no male student has ever been expelled from school for having fathered an illegitimate child (R-15).

In all other forms of student misconduct, the offending student is given a hearing or an interview with either the superintendent of schools or a principal (R-21,22,23). In cases of all such other misconduct there are discretionary degrees of punishment determined by a school principal or the superintendent on the basis of factors in extenuation and mitigation, as, for example, prior offenses, and overall character and attitude evaluation (R-29,30). In all other forms of misconduct, leniency is applied in cases of a first offense (R-23), and suspension -- even for a period of weeks -- is applied only after multiple infractions (R-22).

Clydie Marie Perry completed the eleventh grade in 1965; since that year she has not attended school (R-65). In September,1967 she took the initiative to have herself readmitted (R-65). She had been a student in good standing up to the time she became pregnant (R-69). She testified that she wanted to return to school because she believed that completing high school was important to her economic future (R-66,67).

Clydie Marie testified that she had never had sexual intercourse prior to the experience which led to her pregnancy; that since that time she had not engaged in intercourse, and did not intend to do so prior to marriage (R-68). She further stated that she regretted her mistake (R-69), and did not intend discussing it with other children (R-70).

Emma Jean Wilson was fourteen years of age when she testified at the hearing in October, 1967, and would have entered the ninth grade (R-72). Her child was born in January, 1967 in Chicago, where Emma Jean had gone from Grenada when she discovered that she was pregnant (R-74). In Chicago she attended a special school for unwed mothers both during her pregnancy and after the birth of her baby, and in so doing she was able to complete the eighth grade (R-74,75). On completing the eighth grade in the Chicago school, Emma Jean returned to Grenada with the baby and enrolled in Carrie Dotson High School in the fall of the 1967-68 school year (R-75). She was in school for three weeks when she was called into the principal's office and asked to withdraw because of her illegitimate child (R-72,73). While in school Emma Jean never flunked a subject (R-77), and she testified that she wanted to complete her education in order to have a good economic future (R-76).

Emma Jean stated that she had had only the one sexual experience by which she became pregnant and that she did not intend to have another prior to marriage (R-76,77).

Witnesses who knew Clydie Marie and Emma Jean were called. One, Mrs. Senora Springfield, a teacher in Grenada for twenty years, and a neighbor of Clydie Marie's, testified that Clydie Marie "is a very nice, quiet girl, and is regarded in the community as a person of generally good character." She further testified that the girl had acted ashamed of having had pre-marital sexual intercourse and an illegitimate child, and never proud or boastful about it (R-43,45). Mrs. Springfield has a young niece whom she considers to be good and decent, and she testified that she would have no hesitation in allowing her niece to associate with Clydie Marie (R-46).

Another teacher, Mrs. Elizabeth Brown Nichols had instructed Emma Jean during the three weeks of her attendance in September, 1967 (R-49). Mrs. Nichols testified that Emma Jean was an excellent student who seemed highly motivated to learn (R-50). Emma Jean, Mrs. Nichols further testified, seemed a little shy and withdrawn, but worked well with other students when group work was required (R-51). Mrs. Nichols stated that she did not know that Emma Jean had had an illegitimate child until she was expelled from school (R-51), and further stated that, based on her experience as a teacher, she did not believe that Emma Jean was the kind of girl who would try to adversely influence other children (R-52).

Mrs. Peggy Joyce Ross testified that she knows and has been a neighbor of both Clydie Marie and Emma Jean since they were very young (R-54,56). She described both girls as "nice" and "very quiet" (R-54,56). She further testified that to the best of her knowledge neither girl was, nor had a reputation as, "loose", promiscuous", or "immoral" (R-55,56).

Some form of suspension or exclusion of pregnant school girls and unwed teenage mothers is not an uncommon tradition in various localities throughout the country. The rules permitting girls to return to school after the birth of their babies are varied. Some school districts have followed the practice of deciding on a case-by-case basis (Howard, pp. 20, 21). Others have employed the same general practice but require that such a returning girl be enrolled in a school other than the one which she previously attended (Rumsey, p. 9).

Increasingly, school boards which have employed rules of exclusion either solely during pregnancy or subsequent to the birth of the baby as well, are coming to re-examine such policy (Howard, pp. 6,7). The change is being spurred by a better appreciation of, as Dr. Sarrel put it, the disastrous consequences which attend illegitimacy (Sarrel, p. 12). These consequences have been recognized as medical, psychological, sociological, as well as educational in scope (Sarrel, p. 12). Educationally, it has been found that long periods of denied access to school "sours the educational motivation of the girls and contributes to their becoming drop-outs" (Sarrel, p. 12). Dr. Sarrel did a study of 100 teenage girls who after a first illegitimate child were barred from school. At the end of five years, 95 had had repeat pregnancies, and 91 of these girls were unmarried, totaling 349 pregnancies (Sarrel, pp. 12,13). Sixty of the girls were on welfare and they accounted for a total of 240 of the 349 children. Plaintiffs' experts agreed that the denial of access to education made such results almost certain (Sarrel, p. 47; Howard, pp. 9,10).

The expert witnesses testified that in communities considering allowing unwed mothers to return to school, there usually were fears that they would have contaminating or disruptive effects on their fellow students (Howard, pp. 8,9; Sarrel, p. 19; Rumsey, p. 10). In some communities efforts were made to learn whether any factual basis supported fears of the danger of contamination, and none was found (Rumsey, p. 12). However, communities which have permitted such girls to return to school have found their fears of contamination and disruption unfounded (Howard, p. 9; Rumsey, pp. 14,15). These reports come from communities and school districts of various sizes and locations throughout the country (Howard, pp. 31,32).

One expert testified that in his opinion the presence of unwed mothers served as an effective deterrent to other girls to engage in premarital sexual intercourse which, in his opinion, has led to a decline in the number of illegitimate pregnancies (Sarrel, pp. 36,37). Though all the experts considered the programs through which girls are returning to school desirable, there is evidence that they are not indispensible to positive results.

Prior to the adoption of the program at Yale, Sarrel, for a period of five years, followed the progress of 56 girls who had had a first illegitimate child and were allowed to return to school (Sarrel, pp. 28,29). He testified that 85% of these girls finished high school, and six of these girls entered college (Sarrel, p. 29).

JURISDICTION

The arguments of plaintiffs, and the opinion of Judge Clayton in support of the jurisdiction of this Court, are a matter of record in this case, and need only be briefly reiterated here.

Plaintiffs, in their complaint, alleged that this Court has jurisdiction of this action based on the provisions of 28 U.S.C. s1343. In its opinion, after hearing on plaintiffs' motion for preliminary injunction, the District Court, per Judge Clayton, sitting by Special Designation as District Judge, quoted the relevant sub-sections of section 1343:

> "The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States ....
>
> (4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights ...."

The cause of action which these plaintiffs have brought was created and authorized by Congress in 42 U.S.C. s1983 to protect individual constitutional rights, as was noted by the District Court in its opinion. Judge Clayton, opinion, p. 10. The rights, privileges or immunities which plaintiffs asserted are, inter alia, those contained in the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Defendants do not deny that they were acting under colors of state law, but in their Memorandum Brief, filed on or about October 14, 1967, and on oral argument on January 28, 1969, contend the absence of federal district court jurisdiction on the grounds that, by stipulation, plaintiffs have dropped their claim that the policy here in question was enforced on a racially discriminatory basis, and that without allegations and proof of such racial discrimination, the jurisdiction of this Court must fail. This contention ignores other allegations contained in plaintiffs' complaint and arguments in plaintiffs' memorandum in support of the Court's jurisdiction, filed on or about October 16, 1967, and further ignores conclusions of law contained in the memorandum opinion of Judge Clayton. Plaintiffs originally alleged racial discrimination in the enforcement of the subject policy, and subsequently agreed, by stipulation, to drop said allegation. However, racial discrimination was but one of several alternative grounds alleged by plaintiffs, either of which would be sufficient for the proper exercise of jurisdiction by the federal district court.

In their memorandum in support of jurisdiction, plaintiffs argued, inter alia:

> "The complaint avers that defendants' blanket policy (clearly a "regulation, custom, or usage") of denying unwed mothers admission to the schools deprives plaintiffs of rights and privileges secured by the Fourteenth Amendment to the United States Constitution. Inter alia, the policy violates the due process clause of the Fourteenth Amendment because it is not reasonably related to any valid purpose (VIII), and because it is enforced in an arbitrary and capricious manner without reasonable standards or fair procedures (VIII). Inter alia, the policy violates the equal protection clause because it creates an invidious classification, discriminating against unwed mothers because of their status and sex (VII)."

The District Court, per Judge Clayton, concluded:

> "The claims of plaintiffs of unconstitutional deprivation of rights secured by the Fourteenth Amendment cannot be classed as immaterial, insubstantial or frivolous. Thus, for present purposes only, this court now holds that it does have jurisdiction of the subject matter of this suit and of the parties. A host of authorities could be cited to support this view, but at this time, no good would result therefrom." (Clayton, opinion, p. 10) (emphasis supplied).

Jurisdiction has been held proper in actions wholly unrelated to allegations of racial discrimination but nevertheless relying on the equal protection and due process clauses. See, e.g., Baker v. Carr, 369 U.S. 186 (1962); Haque v. CIO, 307 U.S. 497 (1939); Monroe v. Pape, 365 U.S. 167 (1961); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 990 (1961); Glicker v. Michigan Liquor Control Commission, 160 F.2d 96 (6th Cir. 1947); McCoy v. Providence Journal Co., 190 F.2d 760 (1st Cir. 19), cert. denied, 342 U.S. 894 (1951).

I

The Automatic and Permanent Expulsion of Plaintiffs From School Without Any Preliminary Procedures Violated Their Rights Under the Due Process Clause of the Fourteenth Amendment.

It is a constitutional principle of long and consistent tradition that "Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law." Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 990 (1961), at p. 155; and see, e.g., Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

The minimum procedural requirements necessary to satisfy due procesa depend upon the circumstances and the interests of the parties involved. Dixon, supra. In Joint Anti-Fascist Refugee Committee v. McGrath, Mr. Justice Frankfurter, in a concurring opinion, stated:

> "It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights. And so, no one now doubts that in the criminal law a 'person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense. . . .' Nor is there doubt that notice and hearing are prerequisite to due process in civil proceedings, e.g., Coe v. Armour Fertilizer Works, 237 U.S. 413 (1915). . . . Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity are tolerated." pp. 164-165.

The interests of the parties and the circumstances surrounding the expulsion of these plaintiffs provide no basis for an exception to the due process requirement of notice and fair hearing. Dixon v. Alabama State Board of Education, supra; Woods v. Wright, 334 F.2d 369 (5th Cir. 1964). The rare exception in which the courts have permitted an exception to the rule has been those cases involving alleged threats of immediate danger to the public or to national security, See, e.g., Ludecke v. Watkins, 335 U.S. 160 (1948) (narrowly upholding the Attorney General's summary denial of a visa to an alien deemed dangerous to national security); and see United States ex rel Knauff v. Shaughnessy, 338 U.S. 521 (1950). In Dixon v. Alabama State Board of Education, supra, a case in which students of a publicly supported college successfully challenged their summary expulsion, the respective interests of the parties were evaluated by the Court of Appeals for the Fifth Circuit. Finding that the State of Alabama had no interest sufficient to justify summary expulsion, the Court said:

> "In the disciplining of college students there are no considerations on immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the examples set by the Board in failing so to do . . . can well break the spirits of the expelled students and of others familiar with the injustice, and do inestimable harm to their education." Dixon, supra, p. 157.

The opportunity for an education may, in the highly complex and competitive society of America, have come to be recognized as a right; Knight v. State Board of Education, 200 F. Supp. 174 (M.D. Tenn. 1961); cf. Lamont v. Postmaster General, 381 U.S. 301 (1965) (right of access to information), rather than a privilege. Whatever its precise nature, its vital importance as a private interest has been securely established for due process purposes.[1] The Fifth Circuit in Dixon has said:

> "It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens." p. 157.

What was said in Dixon with respect to the importance of a college education must apply with even greater force with respect to the continuation and completion of high school education.

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[1] The district court in Dixon had upheld summary expulsion, inter alia, on the grounds that plaintiffs had no constitutional right to attend a public college. 186 F.Supp., at p. 950. However, the due process requirement of notice and fair hearing need not be predicated on the alleged violation of a prior constitutional right. Cafeteria and Restaurant Workers Union v. McElroy, et al., 81 S.Ct. 1743 (1961).

II.

The Defendant's Rule of Automatically and Permanently Expelling Teenage Unwed Mothers Violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment Because It is Inflexible, Unreasonable, Arbitrary and Capricious and has No Reasonable Relation to any Valid Purpose.

The Fourteenth Amendment requires that a state regulation "shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *cf*. *Gulf C. & S.F.R. v. Ellis*, 165 U.S. 150, 155 (1898); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

The reasonableness of a regulation is to be determined upon the basis of a careful examination of all the relevant facts in a particular case. *Nebbia v. New York, supra*. In this case the interest of the State of Mississippi in regulating the morals of its citizens collides with the vital interest of the individual in obtaining education. The crucial importance of education has been recognized by the Fifth Circuit in an historic decision. *Dixon v. Alabama State Board of Education*, *supra*. Education is all the more important to unwed teenage mothers and their children because of the almost certain disastrous economic, social and cultural consequences which attend illegitimacy. The importance of the individual interests at stake requires that the closest scrutiny be given to an infringing state regulation.

At the outset, it is an undisputed fact that plaintiffs have been excluded from school solely because they have given birth to illegitimate children. It is thus irrebutably presumed that any girl who gives birth to one illegitimate child is irredeemably corrupt and that the presence in school of any such girl creates such a threat of corruption of other students that permanent "quarantine" is viewed as the only solution. The inferential chain underlying the rule is not based on even general supportive evidences and is, in fact, at war with a good deal of evidence and law to the contrary.

The presumption that out-of-wedlock pregnancy is per se proof of bad character and immorality has been specifically rejected. Nutt v. Board of Education of Goodland, 278 Pac. 1065 (1929). Similarly, the assumption that unwed teenage mothers pose such a disruptive threat that their exclusion from school may reasonably be continued after they have given birth to their children has also been rejected. Ohio ex rel Adle v. Chamberlain, 175 N.E.2d 539 (C.P. 1961), Alvin Independent School District v. Cooper, 404 S.W.2d 76 (1966).

The arbitrariness and capriciousness of the rule is demonstrated by the fact that its punitive sanction applies to only one of the offending parties, i.e. the teenage mother. The defendants have admitted that no male student has ever been expelled under the rule, and that no attempt has ever been made to ascertain the identity of even one putative teenage father of an illegitimate child. Thus male members of the student body are left at large with certain knowledge of impunity. In terms of the defendants' attempt to "quarantine" (R-37,38) offending girls by keeping them away from their contemporaries, or vice versa, the efficacy of the rule is extremely questionable, since plaintiffs have ample opportunity to associate with their contemporaries after school hours during the week and during weekends. Moreover, defendants have produced no evidence to support the thesis that "quarantine" if necessary in some cases need be permanent in all cases. The Supreme Court has said that where the interest placed in jeopardy by the State regulation is especially vital, the courts will forbid "broad prophylactic rules" and require "precision of regulation". NAACP v. Button, 371 U.S. 415, 438 (1963). The breadth of the "abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488 (1960); Griswold v. Connecticut, 381 U.S. 479, 485 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

> "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama, 377 U.S. 288, 307 (1964); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957); Shelton v. Tucker, supra; Aptheker v. Secretary of State, supra.

Plaintiffs have presented evidence which contradicts the basic assumptions on which the rule is founded. This uncontradicted evidence shows that all teenage unwed mothers cannot be judged by one inflexible standard, and that careful consideration of such factors as a girl's general reputation, academic record, and current attitude and motivation for education provide a basis for objective determinations on a case-by-case basis. Plaintiffs' evidence further shows that the impact of returning teenage unwed mothers to school depends upon the individual girl; and that generally the return of such girls has not been followed by disruption and increased illegitimacy. In fact, experience has shown that some of these girls have served as constructive examples because of their high motivation for education (Sarrel, pp. 36-37).

On the other hand, the superintendent conceded that not all girls who might become mothers of illegitimate children if allowed to return to school would exert a disruptive or corruptive influence on their fellow students (R-33). He also conceded that, as he is called upon to do in other cases of student infraction of school rules (R-29), he could, if allowed, make a judgment in each case, on the basis of character and attitude, as to whether an unwed teenage mother should be allowed to return to school (R-40).

The fatally defective rigidity of the rule is further illustrated by comparing the punitive sanction which its infraction entails with those which obtain in other forms of student misconduct. In fact, no other form of student misconduct on or off campus gives rise to automatic and permanent expulsion. In all other instances an offending student is interviewed before disciplinary action is taken. Usually the student receives a warning, and even temporary suspension is rarely resorted to.

Defendants have offered no rational explanation for singling out illegitimacy as a form of misconduct so grave as to require the singularly harsh punishment which it entails. Moreover, in light of the countervailing importance of education to both the citizen and the state, no rational explanation is possible.

In Thomas v. Housing Authority of City of Little Rock, 282 F.Supp. 575 (1967), a similar rule of a public housing authority was successfully challenged. There, mothers of illegitimate children were automatically barred from publicly sponsored low-income housing. In invalidating the rule on due process and equal protection grounds, the Court stated:

> "The prohibition of the present policy is absolute. It makes no distinction between the unwed mother with one illegitimate child and the unwed mother with ten such children; it does not take into account the circumstances of the illegitimate birth or births, the age, knowledge, training or experience of the mother, or the possibility or likelihood of future illegitimate births. . . .
>
> . . .
>
> "In the Court's eyes the present regulation is drastic beyond any reasonable necessity in the context in which it was promulgated."

CONCLUSION

Plaintiffs respectfully urge that the Court has juisdiction over this cause, and that such be found and declared. Plaintiffs further urge that on the basis of the uncontested evidence in this case they were permanently barred from school because of a rule which is unconstitutional in two major respects: it provides for automatic expulsion, thus depriving plaintiffs of notice and a fair and impartial hearing; further, it is in its substantive operation overbroad, inflexible, capricious and unreasonable.

Plaintiffs have presented uncontradicted expert evidence which casts grave doubts on the validity of the blanket assumptions underlying the rule -- that out-of-wedlock pregnancy is conclusive evidence of immoral character and in all instances justifies permanent quarantine. Plaintiffs have presented uncontested evidence of their generally good character, despite the mistake of illegitimacy each has made. Plaintiffs finally urge the Court that on the basis of the record in this case they are entitled to an order enjoining defendants from obstructing their immediate readmission to school and holding unconstitutional defendants' blanket rule of automatic, permanent expulsion.

Respectfully submitted,

PAUL BREST
REUBEN V. ANDERSON
538 1/2 North Farish Street
Jackson, Mississippi 39202

JACK GREENBERG
JAMES N. FINNEY
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

COPY

Special Circular No. 10, 1968-1969

BOARD OF EDUCATION OF THE CITY OF NEW YORK
OFFICE OF THE SUPERINTENDENT OF SCHOOLS

September 27, 1969

TO SUPERINTENDENTS AND SECONDARY PRINCIPALS

Ladies and Gentlemen:

EDUCATION OF PREGNANT STUDENTS

In recent years the number of pregnant girls of school age has been increasing steadily. These students present a unique educational problem for which we have been attempting to make provision.

We have set up a number of centers for continuing their full-time education and are developing others. Each such center operates under the leadership of a coordinator of licensed supervisory rank and has the same status and recognition as any other school in our system. It is multi-disciplined including a regular secondary school curriculum with provision for special health and counseling needs. Moreover, in association with community and health agencies, a spectrum of other necessary services is provided. Such services include medical care as well as welfare, social work, nursing and special counseling as needed.

Interim evaluation of this program of special centers has supported our original projection that they can provide more effective education than is available through home or part-time instruction which are also available. However, they must be regarded as one resource among a number because of the lack of space and because they may not be the answer to every problem. Our responsibility for the education of all school age children includes the pregnant teen-ager.

These girls should be permitted to remain in their regular school program as long as their physical and emotional condition permits. An individual decision is necessary to determine what is in the best interest of each student found to be pregnant. The girl's parents and physician should be consulted in developing the educational plan to fit her needs. If she is a short time away from completing the term's work or from graduation, and, if her physician advises that she may attend classes, she should be encouraged to continue at her home school. Should this consultation lead to the conclusion that continued attendance at the home school may be detrimental to her physical or mental well-being, she should be transferred to one of the special centers or other suitable arrangements should be made for continuing her education. As in other school matters, the final decision will rest upon the good judgment of the principal of the home school who will consider all the factors involved.

After delivery, the young mother is expected to attend school. If she is returning to an educational center, she should be transferred to a normal school situation as soon as possible. The receiving school must grant credit for all of the work completed at the special educational center as certified by the records forwarded by that school's coordinator. Some of these girls will have completed the course requirements for high school graduation. The guidance counselor of the special educational center will contact the appropriate guidance counselor of the high school she formerly attended, and send her completed record for evaluation. If the requirements for graduation are met, the high school of origin will issue the appropriate diploma.

It is not possible to predict all the problems that may develop in the education of these children. We can expect that the principals and guidance counselors of high schools will cooperate sympathetically with the coordinators and guidance personnel of the special centers in resolving situations that may arise in order to encourage and expedite the continued education of these children.

Please accept my appreciation for your help in supporting this effort to fulfill our obligation to provide maximum education for these young people.

Sincerely yours,

SEELIG LESTER
Deputy Superintendent

The request to destroy the remnants of whatever files still remain is denied.

I think Shakespeare, at the time that he wrote some of his yarns, may have contemplated that this case might come up and named two of them, in regard to the evidence that has been disclosed here, one was "A Comedy of Errors" and the other was "Much Ado About Nothing."

That is the findings of the Court, that is the decision of the Court.

We will stand adjourned, Mr. Marshal.

Fay ORDWAY, by her parent, Iona Ordway

v.

Robert HARGRAVES, Principal of North Middlesex Regional High School, et al.

Civ. A. No. 71-540-C.

United States District Court,
D. Massachusetts.

March 11, 1971.

Action under Civil Rights Act brought on behalf of pregnant, unmarried, senior at high school against school officials who had informed student that she was to stop attending regular classes at high school. The plaintiff moved for preliminary injunction. The District Court, Caffrey, J., held that plaintiff was entitled to preliminary injunction requiring school officials to readmit her on a full-time, regular-class-hour, basis, where there was neither showing of danger to her physical or mental health resultant from her attending classes during regular school hours nor valid educational or other reason to justify requiring her to receive educational treatment not equal to that given all others in her class.

Respondents ordered to readmit plaintiff until further ordered.

1. Injunction ⚿147

To obtain preliminary injunction, plaintiff must show that denial of injunction will cause certain and irreparable injury to plaintiff and that there is reasonable probability that plaintiff will ultimately prevail in the litigation.

2. Injunction ⚿147

Pregnant, unmarried, high school senior was entitled to preliminary injunction requiring school officials to readmit her on a full-time, regular-class-hour, basis, where there was neither showing of danger to her physical or mental health resultant from her attending classes during regular school hours nor valid educational or other reason to justify requiring her to receive educational treatment not equal to that given all others in her class, in action brought under Civil Rights Act. 42 U.S.C.A. § 1983; 28 U.S.C.A. § 1343.

3. Schools and School Districts ⚿148

Right to receive public school education is basic personal right or liberty.

4. Schools and School Districts ⚿170

Burden of justifying any school rule or regulation limiting or terminating right to receive public school education is on school authorities.

◆

Stuart R. Abelson, Carolyn R. Peck, Center for Law and Education, Cambridge, Mass., for plaintiff.

James E. Shaw, Dunstable, Mass., for defendants.

MEMORANDUM and ORDER

CAFFREY, District Judge.

This is a civil action brought on behalf of an 18-year old pregnant, unmarried, senior at the North Middlesex Regional High School, Townsend, Massachusetts. The respondents are the Principal of the High School, Robert Hargraves, the seven individual members of the North Middlesex Regional High School Committee, and the School Committees of Pepperell and Townsend. The cause of action is alleged to arise under the Civil

Rights Act, 42 U.S.C.A. § 1983, and jurisdiction of this court is invoked under 28 U.S.C.A. § 1343. The matter came before the court for hearing on plaintiff's application for preliminary injunctive relief in the nature of an order requiring respondents to re-admit her to the Regional High School on a full-time, regular-class-hour, basis.

At the hearing, eight witnesses testified. On the basis of the credible evidence adduced at the hearing, I find that the minor plaintiff, Fay Ordway, resides at East Pepperell, Massachusetts, and is presently enrolled as a senior in the North Middlesex Regional High School; and that plaintiff informed Mr. Hargraves, approximately January 28, 1971, that she was pregnant and expected to give birth to a baby in June 1971. There is outstanding a rule of the Regional school committee, numbered Rule 821, which provides: "Whenever an unmarried girl enrolled in North Middlesex Regional High School shall be known to be pregnant, her membership in the school shall be immediately terminated." Because of the imminence of certain examinations and the fact that school vacation was beginning on February 12, Mr. Hargraves informed plaintiff that she was to stop attending regular classes at the high school as of the close of school on February 12. This instruction was confirmed in writing by a letter from Mr. Hargraves to plaintiff's mother, Mrs. Iona Ordway, dated February 22, 1971, in which Mr. Hargraves stated that the following conditions would govern Fay Ordway's relations with the school for the remainder of the school year:

a) Fay will absent herself from school during regular school hours.

b) Fay will be allowed to make use of all school facilities such as library, guidance, administrative, teaching, etc., on any school day after the normal dismissal time of 2:16 P.M.

c) Fay will be allowed to attend all school functions such as games, dances, plays, etc.

d) Participation in senior activities such as class trip, reception, etc.

e) Seek extra help from her teachers during after school help sessions when needed.

f) Tutoring at no cost if necessary; such tutors to be approved by the administration.

g) Her name will remain on the school register for the remainder of the 1970–71 school year (to terminate on graduation day-tentatively scheduled for June 11, 1971).

h) Examinations will be taken periodically based upon mutual agreement between Fay and the respective teacher.

Thereafter, plaintiff retained counsel, a hearing was requested, and was held by the school committee on March 3, 1971. The school committee approved the instructions and proposed schedule set out in Mr. Hargraves' letter of February 22, and a complaint was filed in this court on March 8.

[1] It is well-established that in order to obtain a preliminary injunction, the plaintiff must satisfy two requirements, (1) that denial of the injunction will cause certain and irreparable injury to the plaintiff, Celebrity, Inc. v. Trina, Inc., 264 F.2d 956 (1 Cir. 1959), and (2) "that there is a reasonable probability that (she) will ultimately prevail in the litigation." Cuneo Press of N.E., Inc. v. Watson, 293 F.Supp. 112 (D.Mass.1968).

At the hearing, Dr. F. Woodward Lewis testified that he is plaintiff's attending physician and that she is in excellent health to attend school. He expressed the opinion that the dangers in attending school are no worse for her than for a non-pregnant girl student, and that she can participate in all ordinary school activities with the exception of violent calisthenics. An affidavit of Dr. Charles R. Goyette, plaintiff's attending obstetrician, was admitted in evidence, in which Dr. Goyette corroborated the opinions of Dr. Lewis and added his opinion that "there is no reason that Miss Ordway could not continue to attend school until immediately before delivery."

Dr. Dorothy Jane Worth, a medical doctor, employed as Director of Family Health Services, Massachusetts Department of Public Health, testified that in her opinion exclusion of plaintiff will cause plaintiff mental anguish which will affect the course of her pregnancy. She further testified that policies relating to allowing or forbidding pregnant girls to attend high school are now widely varying within the state and throughout the United States. She testified that both Boston and New York now allow attendance of unmarried pregnant students in their high schools. She further testified that she was not aware of any reason why any health problems which arose during the day at school could not be handled by the registered nurse on duty at the high school.

Dr. Mary Jane England, a medical-doctor and psychiatrist attached to the staff of St. Elizabeth's Hospital, expressed the opinion that young girls in plaintiff's position who are required to absent themselves from school become depressed, and that the depression of the mother has an adverse effect on the child, who frequently is born depressed and lethargic. She further testified that from a psychiatric point of view it is desirable to keep a person in the position of plaintiff in as much contact with her friends and peer group as possible, and that they should not be treated as having a malady or disease.

Mrs. Janice Montague, holder of a Master's degree in social work from Simmons Graduate School, testified that on the basis of her eleven years experience working with Crittenton House, she has learned that the consensus among social workers who specialize in working with pregnant unwed girls is to give to the individual the choice of whether to remain in class or to have private instruction after regular class hours.

Plaintiff testified that her most recent grades were an A, a B-plus, and two C-pluses, and that she strongly desires to attend school with her class during regular school hours. She testified that she has not been subjected to any embarrassment by her classmates, nor has she been involved in any disruptive incidents of any kind. She further testified that she has not been aware of any resentment or any other change of attitude on the part of the other students in the school. This opinion of plaintiff as to her continuing to enjoy a good relationship with her fellow students was corroborated by the school librarian, Laura J. Connolly.

The remaining witness for plaintiff was Dr. Norman A. Sprinthall, Chairman of the Guidance Program, Harvard Graduate School of Education, who testified that in his opinion the type of program spelled out in Mr. Hargraves' letter of February 22, for after-hours instruction, was not educationally the equal of regular class attendance and participation.

It is clear, from the hearing, that no attempt is being made to stigmatize or punish plaintiff by the school principal or, for that matter, by the school committees. It is equally clear that were plaintiff married, she would be allowed to remain in class during regular school hours despite her pregnancy. Mr. Hargraves made it clear that the decision to exclude plaintiff was not his personal decision, but was a decision he felt required to make in view of the policy of the school committee which he is required to enforce as part of his duties as principal. In response to questioning, Mr. Hargraves could not state any educational purpose to be served by excluding plaintiff from regular class hours, and he conceded that plaintiff's pregnant condition has not occasioned any disruptive incident nor has it otherwise interfered with school activities. Cf. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 514, 89 S.Ct. 733, 740, 21 L.Ed.2d 731 (1969), where the

Supreme Court limited school officials' curtailment of claimed rights of students to situations involving "substantial disruption of or material interference with school activities."

Mr. Hargraves did imply, however, his opinion is that the policy of the school committee might well be keyed to a desire on the part of the school committee not to appear to condone conduct on the part of unmarried students of a nature to cause pregnancy. The thrust of his testimony seems to be: the regional school has both junior and senior high school students in its student population: he finds the twelve-to-fourteen age group to be still flexible in their attitudes; they might be led to believe that the school authorities are condoning premarital relations if they were to allow girl students in plaintiff's situation to remain in school.

It should be noted that if concerns of this nature were a valid ground for the school committee regulation, the contents of paragraph b), c) and d) of Mr. Hargraves' letter of February 22 to plaintiff's mother substantially undercut those considerations.

[2] In summary, no danger to petitioner's physical or mental health resultant from her attending classes during regular school hours has been shown; no likelihood that her presence will cause any disruption of or interference with school activities or pose a threat of harm to others has been shown; and no valid educational or other reason to justify her segregation and to require her to receive a type of educational treatment which is not the equal of that given to all others in her class has been shown.

[3, 4] It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently, the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities. Cf. Richards v. Thurston, 424 F.2d 1281, at 1286 (1 Cir. 1970), where the court ruled:

> "In the absence of an inherent, self-evident justification on the face of the rule, we conclude that the burden was on the defendant."

On the record before me, respondents have failed to carry this burden. Accordingly, it is

Ordered:

1. Respondents are to re-admit plaintiff to regular attendance at North Middlesex Regional High School until further order of this court.
2. This order will be effective as of the opening of school, at 8:00 A.M., Monday, March 15, 1971.

July 19, 1971

Mr. Fred Lewis
Attorney at Law
Mass. Dept. of Education
182 Tremont St.

Dear Mr. Lewis:

About four months ago, the Harvard Center for Law and Education represented Miss Faye Ordway, an unmarried pregnant high school girl, who had been prevented from attending regular high school classes by the North Middlesex Regional High School for the sole reason of her pregnancy. The respondent school committee had offered Miss Ordway the opportunity to visit her teachers after school, receive free tutoring at her request, participate in extra-curricular activities, such as the high school yearbook, and to graduate on schedule with her class. Miss Ordway took the position that even this non-punitive program denied her right to attend regular classes and to engage in exchange of dialogue with her fellow students and therefore denied her first and fourteenth amendment constitutional rights to equal protection of the laws. She proceeded to bring suit in the Massachusetts Federal District Court and put into evidence the testimony of a number of experts in the medical, public health, social work, and educational areas. These experts -- whose testimony is summarized by the court in the opinion attached, Ordway vs. Hargraves (D.C. Mass., No. 71-540-6, 3/11/1971), testified that neither Miss Ordway nor the unborn child ran any undue physical or medical risks by Miss Ordway's participation in any school activity (including even gym) and that the exclusion of a pregnant girl from association with her peers would be both demoralizing to the young mother, and potentially damaging to the fetus. Moreover, Professor Norman Sprinthall, Associate Professor of Education at the Harvard Graduate School of Education, examined the educational program offered and stated that in his opinion as an expert, an educational program which separated Miss Ordway from her ordinary classes was at most a supplement to, and not a substitute for, attendence in regular classes. Other witnesses testified that Miss Ordway's attendance at school (she had remained in school until the fifth month of pregnancy) had caused no substantial disruption to her school, thereby bringing her within the "no substantial disruption" test of the famous case of Tinker vs. Des Moines Independent Community School District, 393 US 503 (1969) wherein the Supreme Court limited school officials' curtailment of constitutional rights of students to situations involving "substantial disruption of or material interference with school activities."

Upon hearing the evidence, Judge Andrew Caffrey ordered the respondent school district to readmit Miss Ordway to regular attendance to North Middlesex Regional High School. Applying the law to the evidence before it, the court said,

> It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently, the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities. CF. Richards v. Thurston,

> 424 F.2d 1281 (1 Cir. 1970), where, at 1286, the court ruled "(I)n the absence of an adherent self-evident justification on the face of the rule, we conclude that the burden was on the defendant." On the record before me respondents have failed to carry this burden.

In considering the applicability of the *Ordway* opinion to other districts in Massachusetts, which still exclude unmarried pregnant high school girls from attendance at regular classes, several points should be kept in mind. First, the *Ordway* opinion, though technically applying only to the named respondent school district, draws its legal authority from the right to control one's own person, established beyond challenge in the First Circuit Court of Appeals case of *Richards v. Thurston*, 424 F. 2d 1281 (1 Cir. 1970) (personal right to control one's appearance extends to long-haired males). Second, the court ruled on a record where the respondent school district had attempted to provide an equivalent educational program to the excluded girl, and suggests a *fortiori* that more comprehensive efforts to deny pregnant girls their right to an equal educational opportunity, i.e. total exclusion, would fail even more drastically to conform to the requirements of the Federal Constitution. It is therefore apparent that those school districts which persist in excluding unmarried pregnant high school girls from attendence in regular classes have subjected themselves to the imminent possibility of further lawsuits where the outcome must be a vindication of the right of pregnant school girls to attend regular classes. In addition, the outcome of the *Ordway* case should serve to put school districts on notice that continued exclusion of unmarried pregnant high school girls violates their constitutional rights, and creates a federal action which will likely result in imminent reinstatement of the girls, with or without payment of damages under Section 1983 of the Federal Civil Rights Act. The fact that a number of Massachusetts school systems, the largest being Boston as of February 1, 1971, have adopted new policies towards pregnant high school girls giving them a *choice* of continued regular attendence, special programs, or abstention from school, underscores the arbitrariness of continued exclusion of girls whose greatest need and desire is to carry on in their regular educational program.

The question now facing the Massachusetts Board of Education, and the Commissioner of Education as its executive official, is whether the Board of Education has the authority to adopt a statewide regulation embodying the *Ordway* decision and mandating the extension of all Massachusetts school committee policies which exclude unmarried pregnant high school girls from regular school attendence. Support for such a policy appears in Chapter 15, Section 1G, of the Massachusetts General Laws, wherein the purposes of the board are stated as the duty "to support, serve and plan general education in the public schools." Specifically, Chapter 15, Section 1G states that "the board shall see to it that all school committees comply with all laws relating to the operation of the public schools (our emphasis)." In the event of non-compliance, the general laws mandate that the commissioner of education "shall refer all such cases to the attorney general of the commonwealth for appropriate action to obtain such compliance." The general laws also authorize the Board of Education to withhold state and federal funds from school committees which fail to comply with the provisions of law relating to the operation of the public schools or any regulation of said board authorized under Chapter 15, Section 1G. The conclusion is inescapable that the legislature has given the Board of Education broad authority to see to it that local school committees obey the law. In the Ordway case, the federal court relied on federal law in establishing the pregnant girl's right to an education, but it is settled constitutional law that the federal law is the "supreme law of the land" and applies to the states under the supremacy clause of the Constitution, Article 6. Chapter 15, Section 1G of the general laws, in confering upon the Board of Education the authority to enforce all laws relating to the operation of the public schools, thus gives the Board the authority to enforce federal laws, as well as state laws. The failure of the Board to see to it that local school districts follow the Ordway case would amount to a dereliction of its legal duty under Chapter 15, Section 1G, and its responsibility to advise school committees of the present state of the law. It is therefore our considered legal opinion that the state board of education has the authority to adopt regulations requiring school committees to retain unmarried pregnant girls in school absent an actual showing of substantial disruption within the schools.

The Harvard Center for Law and Education is, of course, aware that the adoption of new regulations would require state officials to reform to the requirements of the Massachusetts Administrative Procedure Act, General Laws, Cahpter 30A. Such regulations, once adopted, would be enforceable by the department against offending school districts. Cf. Lynch vs. Commissioner of Education, 56 N.E. 2d 896 (Supreme Judicial Court of Massachusetts, Suffolk, 1944); The School Committee of New Bedford vs. Commissioner of Education, 208 N.E. 2d 814 (Supreme Court of Massachusetts, Bristol, 1965). Given the delay inherent in fully conforming to the Massachusetts Administrative Procedure Act, the speed with which Massachusetts school committees are voluntarily altering their policies along the model of the Boston School Committee, and the imminent approach of the 1971-1972 school term, it seems entirely appropriate to the Center that the Commissioner issue a guideline letter to all local school committees advising them of the Ordway decision, the present state of the law, and the sound medical, pyschological, and educational reasons why unmarried pregnant girls should be given a choice of remaining in school, or, at their own choice and option, accepting alternative educational offerings. In the event that abuses persist, it would then be time enough and altogether appropriate for the State Board to proceed to the adoption of new regulations.

There remains a question of considerable practical importance to the responsible school officials of our cities and towns, that is the question of liability of school officials for damages in the event of injuries to pregnant girls. Miss Ordway was, and we recommend that other pregnant school girls be, under a doctor's care. Her doctors, in conformity with the prevailing medical knowledge in the area, found her to be in no danger of injury in attending the public schools. Indeed, the dangers of causing a depressed psychological condition in the mother by isolating her from friends whose support she needs during pregnancy, and the dangers to the fetus of a prolonged depressed condition in the mother argue for inclusion in regular programs, and should be of equal or greater concern to school officials than the remote possibility of injury within the schools themselves. Subject to a doctor's supervision of the pregnancy, there seems to be no reason why school officials are held for their general student population. We recommend therefore, that the liability insurance arrangements, if any, applied to ordinary students, including those who attend school in wheelchairs or with broken limbs, should be applied to pregnant girls without the necessity of special arrangements. It should also be apparent that the remote possibility of injury to pregnant students owing to the potential of negligence of school officials cannot excuse school officials from extending the full range of constitutional rights to pregnant high school students.

A copy of Judge Caffrey's decision in Ordway v. Hargraves is enclosed.

Yours faithfully,

Stuart R. Abelson
Staff Attorney

SRA/baw
Enc.

The Commonwealth of Massachusetts
Department of Education
182 Tremont Street
Boston, 02111

NEIL V. SULLIVAN
COMMISSIONER OF EDUCATION

May 19, 1971

TO: Chairmen of School Committees
Superintendents of Schools

FROM: Neil V. Sullivan
Commissioner of Education

RE: The right of pregnant students to remain in school.

I am enclosing for your information a Federal Court decision by Judge Caffrey, United States District Judge for the District of Massachusetts "Ordway v. Hargraves, North Middlesex Regional High School". I think it important that you bring this information to the attention of your school committee. You will note that the Court ordered reinstatement of Miss Ordway despite a school committee policy that excluded pregnant unwed students.

The core of the decision is to be found on pages 7 & 8 of the enclosure. The Court states:

> "In summary, no danger to petitioner's physical or mental health resultant from her attending classes during regular school hours has been shown; no likelihood that her presence will cause any disruption of or interference with school activities or pose a threat of harm to others has been shown; and no valid educational or other reason to justify her segregation and to require her to receive a type of educational treatment which is not the equal of that given to all others in her class has been shown.
>
> It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently, the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities."

It is conceivable that a different Federal judge could reach a different result in a similar suit or uphold a school's claim of exclusion on the ground of either demonstrated disruption of school activities or valid educational reason. However, a school's legal burden in such cases should prove difficult to shoulder given the trend in both educational practice and judicial precedent. The Ordway decision reflects a widespread and growing concern with the denial of equal educational opportunity that results from exclusion in these situations. There is also increasing recognition that the long run community interest is not served by excluding a student from school, diminishing her opportunity for education and inflicting possible psychological damage, thus affecting her future ability to support and care for herself and her child.

In all cases involving pregnancy it would certainly seem advisable to insure that the student is under the continual supervision of a physician and to ask that he make the determination that no danger to the student's physical or mental health should result from her attending school. This will not only protect the student, it should also offer some protection to school officials in the event injury does occur. Of course concern over any such possible liability should be properly coupled with an awareness that improper exclusion might also be the basis for a damage suit under General Laws Chapter 76, Section 16 or Section 1983 of the Federal Civil Rights Act.

In conclusion, it is my belief that all of the schools of the Commonwealth should hereafter recognize that students, married or not, may not be excluded from school solely because of the fact that they are pregnant. Naturally the privacy of any student who prefers to remain at home during her pregnancy should be respected and partial reimbursement for home or hospital instruction under General Law Chapter 71, Section 46A remains available.

NVS/Lr

MICHIGAN COMPILED LAWS ANNOTATED,
Secs. 388.391-94 (Supp. 1971)

PREGNANT STUDENTS [NEW]

Caption Editorially Supplied

P.A.1970, No. 242, Imd. Eff. Dec. 30

AN ACT to provide for the education of pregnant students.

The People of the State of Michigan enact:

388.391 Expelling or excluding prohibited

Sec. 1. A person, who has not completed high school, may not be expelled or excluded from a public school because of being pregnant.
P.A.1970, No. 242, § 1, Imd. Eff. Dec. 30, 1970.

388.392 Withdrawal from regular school program

Sec. 2. A pregnant person who is under the compulsory school age may withdraw from a regular public school program in accordance with rules promulgated by the state board of education.
P.A.1970, No. 242, § 2, Imd. Eff. Dec. 30, 1970.

388.393 Alternative educational program

Sec. 3. A local school district may develop and provide an accredited alternative educational program for persons who are pregnant and voluntarily withdraw from the regular public school program or a local school district may contract with the nearest intermediate school district offering an educational program required by this act. A local school district shall be reimbursed for these programs in accordance with section 12 of Act No. 312 of the Public Acts of 1957, as amended, being section 3[illegible].622 of the Compiled Laws of 1948.
P.A.1970, No. 242, § 3, Imd. Eff. Dec. 30, 1970.

388.394 Rules

Sec. 4. The state board of education shall promulgate rules to implement this act in accordance with and subject to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Compiled Laws of 1948.
P.A.1970, No. 242, § 4, Imd. Eff. Dec. 30, 1970.

V. THE POLICE AND THE SCHOOLS

UNITED STATES DISTRICT COURT:
SOUTHERN DISTRICT OF NEW YORK

69 Civ. 4006

- - - - - - - - - - - - - - - - - - X

CARLOS OVERTON,

Petitioner,

vs.

RAYMOND C. RIEGER, DIRECTOR
OF THE DEPARTMENT OF PROBATION
OF THE COUNTY OF WESTCHESTER,

Respondent.

- - - - - - - - - - - - - - - - - - X

MEMORANDUM OF LAW
IN SUPPORT OF PETITION FOR HABEAS CORPUS

STATEMENT OF FACTS

On December 21, 1964, police officers came to Mount Vernon High School with a search warrant purporting to authorize them to search, among other places, Petitioner's school locker. The police showed the warrant to Dr. Adolph Panitz, the Vice-Principal, and asked him to accompany them and Petitioner to the latter's locker, where the Vice-Principal opened the locker at police request. The locker contained a coat, identified by Petitioner, in response to a police question, as his own. One of the policemen removed the coat from the locker, searched its pockets, and discovered four marijuana cigarettes.

A Motion to Suppress Evidence was made in the Court of Special Sessions and denied, despite the vacating of the search warrant. Petitioner then pled guilty to an information charging him as a youthful offender, in order to test the lower court's ruling on his motion to suppress. He was sentenced to indeterminate probation for up to five years at the discretion of the court.

The Appellate Term, Second Department, reversed and dismissed the charge, but was itself reversed by a divided New York Court of Appeals. After remand to the Appellate Term for consideration of other matters not decided prior to appeal, Petitioner's conviction was affirmed. Petitioner's writ of certiorari to the U. S. Supreme Court followed. That Court vacated the judgment of the Appellate Term and remanded for further consideration in light of Bumper v. North Carolina, 391 U.S. 543 (1968). A divided New York Court of Appeals reaffirmed its initial decision on remand. Petitioner continues to serve his sentence on probation.

ARGUMENT

PETITIONER'S CONVICTION VIOLATED THE FOURTH AMENDMENT, AS INCORPORATED INTO THE FOURTEENTH, IN THAT IT WAS BASED ON EVIDENCE ILLEGALLY OBTAINED THROUGH AN UNREASONABLE SEARCH AND SEIZURE, PURSUANT TO A DEFECTIVE SEARCH WARRANT.

Before the New York Court of Appeals the State conceded that "the search warrant was properly vacated ...[and] also acknowledge[d] that a search of the locker by the police alone would be invalid without a warrant." Brief for Appellant in the Court of Appeals, p.4. Yet the Court of Appeals adhered to its ruling that the search was valid based on the Vice-Principal's third party consent. This holding that one may be presumed independently to consent to a search after being presented with a warrant by police officers seriously undermined the Fourth Amendment requirement that warrants be valid and is in plain conflict with the Supreme Court's decision to remand for further consideration in light of Bumper v. North Carolina, 391 U.S. 543 (1968).

It is undisputed that the police officers relied on the search warrant. Officer Pappas testified that Petitioner "was searched with the search warrant which gave us permission to search that locker" (R.123)*. The Vice-Principal shared their opinion and agreed that he was "honoring the search warrant" when he led Petitioner and the police to the lockers and opened Petitioner's locker, as well as when he first took the police to Petitioner (R.58, 75, 78). At the time of the search, then, all parties believed it was compelled and authorized by the warrant.

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* "R" refers to the record in the state proceedings.

The State's contention that the Vice-Principal acted in spite of the warrant must be viewed in light of the Supreme Court's rulings regarding knowing and informed waiver. Where constitutional rights are involved, the Court has stressed that waiver must "truly be the product of ... free choice," a choice which is made "knowingly and competently." Miranda v. Arizona, 384 U.S. 436, 458, 465 (1966). More precisely, "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See Amos v. United States, 255 U.S. 313 (1921); Johnson v. United States, 333 U.S. 10 (1948); Gatlin v. United States, 326 F.2d 666 (D.C. Cir., 1963); Waldron v. United States, 219 F.2d 37 (D.C. Cir., 1955). Where it is "petitioner's constitutional right which was at stake ... and not the [Vice-Principal's]", the Court has viewed consent with special strictness. Stoner v. California, 376 U.S. 483, 489 (1964).

In Bumper v. North Carolina, supra, the Supreme Court settled the precise question at issue here. Defendant's grandmother admitted police to her home after they informed her that they had a search warrant. There was testimony that she willingly let the police in, but the Court announced the rule that when " 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant [w e] hold that there can be no consent under such circumstances." 391 U.S. at 548. The Court's rationale for the rule is distinctly applicable here:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.
>
> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion - albeit colorably lawful coercion. Where there is coercion there cannot be consent." 391 U.S. at 548-549.

The Bumper rationale should be applied to this case, as the Supreme Court recognized when it vacated and remanded the case for further consideration in light of Bumper. The

New York Court of Appeals, on remand, however, reaffirmed its original decision on the theory that its initial determination was "proper when rendered and is unaltered by the spirit, if not the language of Bumper v. North Carolina, supra." People v. Overton, 24 N.Y.2d 522, ____, 249 N.E.2d 366, 367, 301 N.Y.S.2d 479, 481 (1969), Appendix, infra, p.3. The court rejected the Supreme Court's position on the theory that the Vice-Principal had a "right" to search Petitioner's locker. According to the Court of Appeals, this "right" became a "duty" when suspicion arose. This hypothesis was offered to eliminate the element of actual coercion on which the Court of Appeals believed the opinion in Bumper rested.

But the distinction drawn between Bumper and Overton is clearly without merit. The fact that the Vice-Principal might conceivably have opened the locker on his own on suspicion had there been no warrant for a police search does not affect the coercive impact exerted on the Vice-Principal by the search warrant actually presented to him. Justice Bergan pointed out in dissent that:

> "Mrs. Leath gave her consent to the search of her own house in Bumper, as the Supreme Court of North Carolina found (State v. Bumper, 270 N.C. 521) but this was not permitted to cover in the coercive effect of a bad search warrant which played a part in the resulting 'consent'.
>
> "Even if, on our own independent evaluation of Bumper, we might think it quite distin-

> guishable from the present problem, there can be no doubt that the Supreme Court saw an analogy between the cases ... We are bound to respect this remand." Appendix, infra, p.5.

Furthermore, even if the school has an obligation to enforce its own regulations, based on groundless suspicion, it has an equally important duty to protect its students from unreasonable searches. To assume that consent would have been granted in this case is to ignore the fact that the school can refuse to allow a search where, for example, police demand to search without a warrant. If the retrospective consent approved by the court below is allowable because there is a duty to consent even to an unreasonable search, then school officials are to be denied any discretion in protecting the rights and privacy of students under their supervision.

Moreover, a finding of valid consent in this case would weaken the force of the warrant as a dependable instrument which can be relied upon to relieve a citizen of personal responsibility for a search. A search warrant is intended to be obeyed, and the Vice-Principal quite properly aided the police in their search. But what should he have done had he understood that his aid and acquiescence would later be interpreted as a free and independent consent to search? He might well not have cooperated, fearing possible censure or even a civil action for infringing the student's privacy. Under such circumstances, his lack of cooperation would have been prudent. For the warrant might be vacated and the search ruled improper, though he independently consented to it. A school principal responsible for the protection of his students cannot be deemed privileged to accede to every request a policeman makes. The function of the warrant is to make precise the legal boundaries of a search. To permit the Vice-Principal's cooperation to replace informed consent, therefore, undercuts the power and function of the search warrant and unjustifiably extends the force and meaning of consent. Bumper should be reaffirmed here to protect both the viability of the warrant as a reliable authorization to search and the rights of an individual against consent given after presentation of a warrant - a "situation instinct with coercion." Bumper v. North Carolina, supra, at 549.

PETITIONER'S CONVICTION WAS INCONSISTENT WITH THE FOURTH AMENDMENT IN THAT THE SCHOOL VICE-PRINCIPAL LACKED LAWFUL AUTHORITY AS A THIRD PARTY TO CONSENT TO AN UNWARRANTED SEARCH BY POLICE OFFICERS IN QUEST OF EVIDENCE TO SUPPORT CRIMINAL CHARGES, WHERE SAID SEARCH WAS NOT DIRECTED AGAINST THE PERSON NOR EFFECTS OF THE VICE-PRINCIPAL, BUT TO THE LOCKER ASSIGNED TO PETITIONER FOR HIS EXCLUSIVE USE, AND TO PETITIONER'S COAT, WHICH WAS NOT REMOTELY WITHIN THE PURPORTED AUTHORITY OF THE VICE-PRINCIPAL.

Closely related to the issue of the Vice-Principal's contested consent to the search is the substantial question whether a public high school official could consent in any event to unwarranted police searches of student lockers and apparel. It is the student's privacy and liberty which are endangered, not that of the school official, and in this case the search did not arise out of any ordinary school inspections or searches directly related to school activities.

That the locker was a private place is clear from the record. Each student paid a fee for the exclusive use of his locker during the school year, and the lockers could be locked, as Petitioner's was (R. 77). A direct police search of the locker without a valid consent or warrant would have been illegal, as Respondent conceded in its brief in the court below.

In any event, "the Fourth Amendment protects people, not places. ...[W]hat[a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *** Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Katz v. United States, 389 U.S. 347, 351 (1967). Katz, of course, involved the wiretapping of a telephone booth without judicial authorization. Certainly, Petitioner's expectation of a reasonable degree of privacy in his locker and personal jacket is even more justifiable than that of a man in a glass booth. For other recent decisions which emphasize the "basic purpose of [the Fourth Amendment]... to safeguard the privacy and security of individuals ..." Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (administrative housing inspection), see Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Berger v. New York, 388 U.S. 41, 53 (1967); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304-05 (1967).

The federal courts, state courts, and the Supreme Court have been sensitive guardians of the citizen's privacy under the Fourth Amendment not only in direct search cases, but also when a third party purported to have authority to consent to the search and seizure of another person's belongings. Even where, in administrative cases, authority to search was claimed by a state official who was not with the police, courts have not allowed the official invasion of privacy which the Fourth Amendment was designed to prevent.

One particular line of Supreme Court decisions most closely relevant concerns efforts by hotel keepers to consent to the search of a guest's room. Stoner v. California, 376 U.S. 473 (1964), for example, held that a night clerk had no authority to permit a police search of a room, even though there was " 'implied or express permission' to [certain persons]... to enter his room 'in performance of their duties.' " Id. at 489. While the clerk had a right to enter, this right was for certain purposes related to his duties only and was not freely transferable to the police at the "unfettered discretion" of the night clerk. Id. at 490. Similarly, while a school Vice-Principal might claim some degree of authority to inspect lockers periodically for health reasons, or in case of school emergency, this should not imply that he may probe about at will. Yet that is the meaning of the holding by the New York Court of Appeals.

Stoner is but one of a number of cases which refuse to permit the drastic invasions of privacy implicit in allowing consent by a disinterested third party. Justice Stewart recognized this danger in his opinion for the Court in Stoner when he wrote:

> "[It] was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by work or deed, either directly or through an agent. ***
>
> "No less than a tenant of a house, or the occupant of a room in a boarding house, McDonald v. United States, [335 U.S. 451], a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." 376 U.S. at 489, 490.

See also Louden v. Utah, 379 U.S. 1 (1964) (per curiam) (hotel keeper may not consent to search a guest's room); Chapman v. United States, 365 U.S. 610 (1960) (Landlord may not consent to search of tenant's premises); United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949). Only in a particularly rare instance, as when two individuals shared a single duffel bag, has the Supreme Court allowed a third party consent, and that decision was based solely on "plain view" and "mere evidence" cases. See Frazier v. Cupp, 394 U.S. 731 (1969). Certainly the Vice-Principal in the instant case was in no realistic sense a joint occupant with joint use and interest in the locker. His authority to retain a master key was like that of the innkeeper, jail guard, or landlord. It was based upon uneven bargaining power and the strength of authority, not joint interest and use, and hardly congenial agreement.

Decisions by the federal courts of appeal and district courts point in the same direction. Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955), held that a married couple had no authority to consent to a search of their own garage for evidence against the husband's mother-in-law who temporarily resided there. Clearly a homeowner has a greater interest in clearing stolen property from his own garage than a Vice-Principal has in exploring through the lockers of those students who have to leave books and jackets in a locker during the day. Yet this interest is not of constitutional dimension. It cannot override the crucial protection afforded all citizens from invasions of their privacy. The Fourth Amendment interposes "a magistrate between the citizen and the police ... so that an objective mind might weigh the need to invade that privacy in order to enforce the law." Chimel v. California, 395 U.S. 752, ___ (1969). A high school Vice-Principal is no more a judicial officer or magistrate than is a son-in-law. He is more like the District

Attorney who issued the subpoena struck down in Mancusi v. DeForte, 392 U.S. 364, 371 (1968).

Similarly, in United States v. Blok, 188 F.2d 1019 (D.C. Cir. 1951), consent by a government supervisor to search an employee's desk, over which the supervisor clearly had some authority but which was assigned exclusively to the employee, was held not binding on the employee:

> "We think appellee's exclusive right to use the desk assigned to her made the search of it unreasonable. No doubt a search of it without her consent would have been reasonable if made by some people in some circumstances. Her official superiors might reasonably have searched the desk for official property needed for official use. But ... the search that was made ... was precisely the kind of search by policemen for evidence of crime against which the constitutional prohibition was directed. 188 F.2d at 1021."

Again, Blok was a case in which the third party had a greater interest, for an employee often stands in the shoes of his employer, doing delegated work for the employer using the latter's equipment. Yet this interest was held insufficient to stretch beyond the "civil" incidents of employment. It could not justify a short-circuit of the essential warrant requirement.

The central principles behind the constitutional limitations on third party consent were succinctly put in another recent locker case, United States v. Small, 297 F. Supp. 582 (D. Mass. 1969). There Judge Murray invalidated the warrantless search of a subway station locker, although locker company officials cooperated with law enforcement authorities by changing the lock to enable identification of its user. In granting the motion to suppress, Judge Murray pointed out that "the contents of the locker were not 'knowingly expose[d] to the public.' Katz v. United States, 389 U.S. 347, 351 (1967), [and that] [t]he locker itself may be viewed as 'an area where, like a home *** and unlike a field *** a person has a constitutionally protected reasonable expectation of privacy ***.' 389 U.S. at 360." 297 F. Supp. at 584. He stated:

> "It has been repeatedly held that a person who confers a right to inspect or enter an area, without conferring an equal or similar right to the use or enjoyment of that area, does not authorize the other to consent in his behalf to a search by law enforcement authorities." 297 F. Supp. at 586. [Citing Stoner and Chapman.]

See also Niro v. United States, 388 F.2d 535 (1st Cir. 1968) (landlord's caretaker may not authorize search of tenant's part of building); Reeves v. Warden, Maryland Penitentiary, 346 F.2d 915 (4th Cir. 1965) (mother, who lived with defendant in relative's home, may not consent to search of defendant's room); Klee v. United States, 53 F.2d 58 (9th Cir. 1931) (tenant at sufference may object to search with consent of landlord); State v. Matias, 451 P.2d 257 (Hawaii 1969) (overnight guest may object to search authorized by tenant); People v. Overall, 151 N.W.2d 225 (Mich. App. 1967) (relative-lessee may not consent to search of parolee's room); Tompkins v. Superior Court, 59 Cal. 2d 65, 378 P.2d 113, 27 Cal Rptr. 889 (1963) (joint occupant may not consent).

There are further barriers as well to a ruling that the Vice-Principal could consent to a police search, for the Fourth Amendment is by no means limited to the criminal law setting. Nor is it at all clear that the Vice-Principal could have justified his search as incident to enforcing "civil" or "administrative" disciplinary regulations.

Standards for administrative searches by municipal building inspectors have recently been raised virtually as high as standards for criminal searches. Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967); James v. Goldberg, 69 Civ. 2448 (S.D.N.Y. Aug. 18, 1969) (administrative warrant required for welfare searches); New York State Liquor Authority v. Finn's Liquor Shop, 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584 (1969), petition for cert. filed, 38 U.S.L.W. 3055 (U.S. July 23, 1969) (No. 372) (exclusionary rule applicable to administrative disciplinary hearings against liquor licensees). It would be anomalous to permit in this case a lowering of standards for a criminal search because a right to conduct an administrative search may exist. Indeed, this Court made plain in Abel v. United States, 362 U.S. 217, 226 (1960) that "[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts." A housing inspector may not by virtue of his power to enter a building admit a policeman searching for evidence of crime. The search at issue here was not a mere search for school purposes but a search by the police for evidence of crime for which a warrant had been issued.

Granting arguendo that school officials have supervisory power which may extend to inspection of lockers for certain purposes, what is at stake here is the distinction between inspection of the locker by school officials for school purposes and a criminal search by police. Even if school officials may look for violations of school rules or unsanitary conditions, it may not transfer that right to police searching for evidence of crime. See

Knowles, Crime Investigation in the Schools: Its Constitutional Dimensions, 4J. Fam. Law 151 (1964). Compare Moore v. Student Affairs Committee, 284 F.Supp 725 (M. D. Ala., 1968) (searches by school officials permissible if "reasonable" when noncriminal proceeding will result); cf. Madera v. Board of Education, 386 F.2d 778 (2d Cir. 1967), cert. denied, 390 U.S. 1028 (1968) (standard for due process in school hearing depends on seriousness of consequences resulting from hearing).

The power of the Vice-Principal to consent to the search is even more clearly lacking here because the search was not confined to an inspection of the locker but included a search of Petitioner's coat. Even under its authority to control school premises, school authorities cannot be permitted at will to allow the search of the person or personal effects of its students. Courts have distinguished between the power to consent to the search of a room and the power to consent to the search of the personal effects within the room. Reeves v. Warden, supra; People v. Egan, 250 Cal. App. 2d 351, 58 Cal Rptr. 290 (Dist. Ct. App. 1966); State v. Evans, 45 Hawaii 622 (1962); cf. Maxwell v. Stephens, 348 F. 2d 325 (8th Cir. 1965) (dissenting opinion). If Petitioner had been wearing his coat it would clearly have been protected from a search without a warrant in these circumstances. Though he had to take his winter coat off inside the school, Petitioner kept it as private as he could by putting it in his locker. This Court should not accept the lower court's rule that a student in school cannot keep his private belongings private, especially when, as here, no overriding school purpose has been shown as to the coat. Particularly where criminal charges may result, the school should not be held to have the same power over the personal effects of its students as it does over school premises.

The decision reaffirmed by the New York court rested largely on the broad supervisory power of the school. But the teaching of In re Gault, 387 U.S. 1, 13 (1967), that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," indicates the limits of this power. If the guarantee against unreasonable searches and seizures "marks the right of privacy as one of the unique values of our civilization," McDonald v. United States, 335 U.S. 451, 453 (1948) it is unthinkable that minors while attending school could forfeit these rights and thereby suffer criminal penalties. One does not waive his rights to due process by going to school. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961); Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967); Knight v. State Board of Education, 200 F. Supp. 174 (M. D. Tenn. 1961). While Petitioner was subject to supervision by the school, he retained his rights against outside authorities which the school could not waive for him or force him to waive.

If the school is to perform its educational function properly, it must be given authority over what goes on in the classroom. But where a school official attempts to delegate his authority to the police, the school's broad discretion in teaching matters should not obscure the fact that what are at stake are individual rights against a search for evidence of crime. Indeed, it was in sustaining a trespass action against a teacher who had searched a school pupil that a Judge in an earlier time remarked:

> "A child in the public schools of the state is entitled to as much protection as a bootlegger."

Phillips v. Johns, 12 Tenn. App. 354 (Ct. App. 1930). Finally, the extensive scholarly commentary on search and seizure in the context of secondary or higher education has been of one voice in arguing at length that the student as citizen should have Fourth Amendment protections under a reasonable interpretation of existing law. For the major pieces which expand upon this point, see Van Alstyne, The Student as University Resident, 45 Denver L.J. 582, 588-89 & n.14 (1968); Johnson, The Constitutional Rights of College Students, 42 Texas L. Rev. 344, 353-56 (1964); Note, Public Universities and Due Process of Law: Students' Protection Against Unreasonable Search and Seizure, 17 Kan. L. Rev. 512 (1969); Note, College Searches and Seizures: Privacy and Due Process Problems on Campus, 3 Georgia L. Rev. 426 (1969); Comment, 9 Santa Clara Lawyer 143 (1968).

PETITIONER'S CONVICTION AS REAFFIRMED BY THE NEW YORK COURT OF APPEALS ON REMAND, WAS CLEARLY INCONSISTENT WITH BUMPER v. NORTH CAROLINA, 391 U.S. 543 (1968), WHICH SETTLED THE POINT AT ISSUE ON FACTS CLOSELY ANALOGOUS TO THOSE INVOLVED IN THE PRESENT CONTROVERSY

It is well established that rulings of the United States Supreme Court on the meaning of the Federal Constitution bind state courts in subsequent cases, most particularly in subsequent litigation of the same case. Sims v. State of Georgia, 385 U.S. 538, conformed to 153 S.E.2d

567, 223 Ga 126 (1967). The Supreme Court ruled on the precise question at issue here in Bumper v. North Carolina, supra, and so recognized when it vacated the judgment of the New York Supreme Court, Appellate Term, and remanded the case for further consideration in light of Bumper. The decision of the New York Court of Appeals that its initial ruling was in accord with Bumper can not be allowed to stand.

Bumper is quite explicitly founded on the legal coercion present in any situation when an apparently valid search warrant has been presented, and not on the presence or absence either of physical coercion, or of the independent authority to grant consent. The Supreme Court, in keeping with its normal deference to the states, remanded the case to the New York Court of Appeals so that it might render the final judgment in the case rather than be summarily overruled by the highest court. But in light of the reasoning in Bumper, the plain meaning of the order remanding this case for reconsideration in light of Bumper was that Petitioner's conviction should be vacated. As Judge Bergan pointed out, the New York Court of Appeals is bound to respect the remand, and its reconsideration

To uphold Petitioner's conviction, a Court would have to rule that the right to attend public high school can be generally conditioned upon waiving the privilege against compulsory self-incrimination with regard to searches of a student's person, effects (jacket in this case), and locker. When the student has to allow a search of his locker for incriminating evidence, he is forced to incriminate himself in a very direct way The power to retain a key differs only in form from the power to force the student to open the locker himself, remove the contents, empty the pockets, open all containers, and explain what the items are. This compulsion is even greater than that in *Spevack* and its progeny. Beyond doubt, it is "the imposition of [a] sanction which makes assertion of the Fifth Amendment privilege 'costly.' " *Spevack*, *supra*, at 515.

To paraphrase *Spevack*, "[students] are not excepted from the words ..." of the Fifth Amendment. "[Students] also enjoy first-call citizenship." *Id*. at 516. Indeed, *In re Gault*, 387 U.S. 1 (1967), expressly rejected the *in loco parentis* notions from which the Vice-Principal forced his authority and master key upon Petitioner Overton. Noting that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," 387 U.S. at 13, the Gault Court squarely applied the full force of the Fifth Amendment privilege to "civil" juvenile proceedings. Id. at 42-57. It should apply here to curtail the asserted authority of the Vice-Principal to force a school student to waive police access to his locker when a school official seeks to open it in search of incriminating evidence. For further authority in the Spevack line, see also Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280 (1968); Gardner v. Broderick, 392 U.S. 273 (1968); McCarthy v. Arndstein, 266 U.S. 34 (1924) (per Brandeis, J.).

PETITIONER'S STATUS OF BEING ON PROBATION FOR A PERIOD OF FIVE YEARS CONSTITUTES BEING "IN CUSTODY" WITHIN THE MEANING OF THE FEDERAL HABEAS STATUTE

Petitioner is presently in the custody of Raymond C. Rieger, Director of the Department of Probation, Westchester, New York. His probation, which may be revoked at the discretion of the State court, has a potential duration of five years, and leaves open the possibility of confinement by the State if revoked. Under the rules of probation his liberty is restricted to a far greater degree than that of an ordinary citizen. The case is accordingly appropriate for disposition by the Great Writ. See Jones v. Cunningham, 371 U.S. 236, 238-44 (1963) (parolee "in custody"); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950) (excluded alien "in custody" although not in country); Walker v. North Carolina, 372 F.2d 129 (4th Cir. 1967) (per curiam), aff'g 262 F. Supp. 102 (W.D.N.C. 1966) (suspended sentence "in custody"); Foster v. Gilbert, 264 F. Supp. 209 (S.D. Fla. 1967) (custody of defendant's personal attorney nonetheless "in custody"); Rex v. Delaval, 3 Burr. 1434, 97 Eng. Rep. 913 (K.B. 1763) (indentured 18 year old girl entitled to writ where assigned by master to another man "for bad purposes"); Rex v. Clarkson, 1 Str. 444, 93 Eng. Rep. 625 (K.B. 1722) (writ available to woman being kept by guardians away from her husband). Compare Carafas v. LaVallee, 391 U.S. 234 (1968); Peyton v. Rowe, 391 U.S. 54 (1968).

For the reasons outlined in the Verified Petition and supporting Memorandum of Law, Petitioner respectfully urges this Court to issue the writ.

RESPECTFULLY SUBMITTED:

DAVID C. GILBERG
MICHAEL H. GILBERG
22 WEST FIRST STREET
MOUNT VERNON, N. Y. 10550

MELVIN L. WULF
ELEANOR HOLMES NORTON
156 FIFTH AVENUE
NEW YORK, N. Y. 10010

ROY LUCAS
JAMES MADISON CONSTITITIONAL
LAW INSTITUTE
26 WEST 9TH STREET
NEW YORK, N. Y. 10011

ATTORNEYS FOR PETITIONER

WHAT CONSTITUTES YOUR RIGHT TO PRIVACY ON CAMPUS?

Roy Lucas *

I. INTRODUCTION

A. The Problems of Student Privacy

1. Dormitories and Other Dwellings
2. Lockers, Desks, and Enclosures
3. Student Records
4. Reputation and Right to be Let Alone

B. Resolving the Problems to Enhance Privacy

1. Negotiation, Petition, Confrontation
2. Adoption of New Codes Protecting Privacy
3. Use of Affirmative and Defensive Lawsuits to Assert the Various Rights of Privacy

II. THE LAW AND THEORY OF STUDENT PRIVACY

A. Search of the Student, His Dwelling, or his Person and Effects for the Purpose of Seizing Evidence to Justify Disciplinary Action

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* Director - General Counsel, James Madison Constitutional Law Institute, 26 W. 9th St., New York, N.Y. 10011, (212) 475-0590. Editor-in-Chief, COLLEGE LAW BULLETIN, published by U.S.N.S.A., 2115 "S" St., N.W., Washington, D.C. 20008.

1. Rights of the Citizen in Criminal and Administrative Situations to Demand a Search Warrant From the Inspecting Officer, Issued by an Impartial Magistrate or Judge, Based on Proof of Probable Cause to Believe that an Offense has been Committed, and Limited to a Search for Specific Items

(a) Criminal Cases:

"Privacy" A Major Value Protected in All of its Many Forms by the Fourth Amendment -

Katz v. United States, 389 U.S. 347, 351, 359 (1967) (phone booth may not be tapped without prior specific authorization by a judge):

> "[T]he Fourth Amendment protects people, not places. ... [W]hat [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. ***
>
> "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."

Accord, Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Berger v. New York, 388 U.S. 41, 53 (1967); Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294, 304-05 (1967).

"Privacy" Not Dependent Upon Owning Premises -

Jones v. United States, 362 U.S. 257, 266 (1960) (weekend house guest may challenge search by police officers conducted without a warrant):

> "Distinctions such as those between 'lessee,' 'licensee,' 'invitee,' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."

Neutral Judicial Officer, Such as Magistrate, Must Issue Search Warrant, Not Police, District Attorney, or Inspector -

Chimel v. California, 395 U.S. ___, ___, 89 S. Ct. 2034, 2039 (June 23, 1969)(lawful search of person on burglary charge cannot render full search of house valid without specific warrant):

> "'Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. ... It was done so that an objective mind might weigh the need to invade the privacy in order to enforce the law. ... [T]he Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.'"

Mancusi v. DeForte, 392 U.S. 364, 371 (1968):

> "[T]he subpoena ... was issued by the District Attorney himself, and thus omitted the indispensable condition [of] 'a neutral and detached magistrate.'"

Accord, Davis v. Mississippi, 394 U.S. 721, 728 (1969); Spinelli v. United States, 393 U.S. 410, 415 (1969); Katz v. United States, 389 U.S. 347, 357 (1967).

(b) Administrative Inspection Cases:

"Privacy" A Major Value —

Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (administrative housing inspection):

> "The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."

Accord, See v. City of Seattle, 387 U.S. 541, 543 (1967); James v. Goldberg, 69 Civ. 2448 (S.D.N.Y. Aug. 18, 1969) (warrant required for welfare searcher).

Neutral Judicial Officer Also Required in Administrative Search Situations -

See v. City of Seattle, 387 U.S. 541, 546 (1967) (inspection of business premises):

> "[T]he basic component of a reasonable search under the Fourth Amendment - that it not be enforced without a suitable warrant procedure - is applicable in this context, as in others, to business as well as to residential premises."

Accord, Camara v. Municipal Court, 387 U.S. 523, 529 (1967).

Other noncriminal cases applying the standards of the Fourth Amendment include: One 1958 Plymouth v. Pennsylvania, 380 U.S. 693 (1965)(civil forfeiture case); Boyd v. United States, 116 U.S. 616 (1886); Saylor v. United States, 374 F.2d 894 (Ct. Cl. 1967)(civilian Air Force employee entitled to damages where dismissal based on illegally procured evidence); Berkowitz v. United States, 340 F.2d 168 (1st Cir. 1965); Parrish v. Civil Service Commission, 66 Cal. 2d 253, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).

(c) Third Party Consent to the Search and Seizure of A Citizen's Person, Dwelling, and Effects:

Stoner v. California, 376 U.S. 473, 489, 490 (1964) (hotel clerk may not consent to search of guest's room):

> "[It] was the [guest's] constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the [guest] could waive ...."

Other court decisions on the question of third party consent include: *Bumper v. North Carolina*, 391 U.S. 543 (1968)(consent ineffective where induced by invalid search warrant); *Louden v. Utah*, 379 U.S. 1 (1964)(per curiam)(hotel keeper may not consent to search of room); *Chapman v. United States*, 365 U.S. 610 (1960)(landlord may not consent to search of search of tenant's premises); *United States v. Jeffers*, 342 U.S. 48 (1951)(hotel proprietor); *Lustig v. United States*, 338 U.S. 74 (1949)(same); *Niro v. United States*, 388 F.2d 535 (1st Cir. 1968); *Reeves v. Warden, Maryland Penitentiary*, 346 F.2d 915 (4th Cir. 1965); *Holzhey v. United States*, 223 F.2d 823 (5th Cir. 1955); *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951); *Klee v. United States*, 53 F.2d 58 (9th Cir. 1931); *United States v. Small*, 297 F. Supp. 582 (D. Mass. 1969); *Purvis v. Wiseman*, 298 F. Supp. 761 (D. Ore. 1969); *State v. Matias*, ___ Hawaii ___, 451 P.2d 257 (1969); *People v. Overall*, ___ Mich. App. ___, 151 N.W.2d 225 (1967); *Tompkins v. Superior Court*, 59 Cal. 2d 65, 378 P.2d 113, 27 Cal. Rptr. 889 (1963).

Cases which permit some form of third party consent still persist, however, and include: *Wright v. United States*, 389 F.2d 996 (8th Cir. 1968)(roommate); *United States v. Stone*, 401 F.2d 32 (7th Cir. 1968) (stepmother); *Burge v. United States*, 342 F.2d 408 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965); *United States v. Grisby*, 335 F.2d 652 (4th Cir. 1964); *United States v. Botsch*, 364 F.2d 542 (2d Cir. 1966), *cert. denied*, 386 U.S. 937 (1967).

For useful legal commentary and analysis of this crucial question, see Note, Third Party Consent to Search and Seizure, 33 U. Chi. L. Rev. 797 (1966); B.J. GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 49-52 (1969 ed.).

2. Right of the Student in Criminal and Administrative Situations to Demand a Search Warrant From the Inspecting Officer, Issued by an Impartial Magistrate or Judge, Based on Proof of Probable Cause to Believe that a Crime or Disciplinary Infraction has been Committed, and Limited to a Search for Specific Items

According to a 1963 surview, 47% of the public colleges and universities in the United States allow institutional officials to search a dormitory room without the student's consent and in the absence of a justifying emergency. Van Alstyne, Procedural Due Process and State University Students, 10 U.C.L.A.L. Rev. 368, 369 (1963).

The Joint Statement on Rights and Freedoms of Students condemns this practice:

> "Except under extreme emergency circumstances, premises occupied by students and the personal possessions of students should not be searched unless appropriate authorization has been obtained."

> "For premises such as residence halls controlled by the institution, an appropriate and responsible authority should be designated to whom application should be made before a search is conducted. The application should specify the reasons for the search and the objects or information sought. The student should be present, if possible, during the search. For premises not controlled by the institution, the ordinary requirements for lawful search should be followed."

Of similar import are: Van Alstyne, The Student as University Resident, 45 Denver L.J. 582, 588-89 & n.14 (1968); Johnson, The Constitutional Rights of College Students, 42 Texas L. Rev. 344, 353-56 (1964); Student Conduct and Disciplinary Proceedings in a University Setting 18-20 (unofficial study published by N.Y.U. Law School, Aug. 1968); Comment, The Dormitory Student's Fourth Amendment Right to Privacy: Fact or Fiction?, 9 Santa Clara Law. 143 (1968); Note, College Searches and Seizures: Privacy and Due Process Problems on Campus, 3 Geo. L. Rev. 426 (1969); Comment, Public Universities and Due Process of Law: Students' Protection Against Unreasonable Search and Seizure, 17 Kan. L. Rev. 512 (1969).

Court Decisions are Few and Have Yet to Grasp and Grapple With the Difficult Fourth Amendment Questions Involved -

Phillips v. Johns, 12 Tenn. App. 354 (Mid. Sec. Ct. App. 1930);

"A child in the public schools of the state
is entitled to as much protection as
a bootlegger."

Moore v. Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968)(college rule permitting search with no warrant held valid where suspicion reasonable);

Overton v. New York, 20 N.Y.2d 360, 229 N.E.2d 596, 283 N.Y.S.2d 22 (1967), *vacated and remanded for reconsideration in light of Bumper v. North Carolina* [391 U.S. 543 (1968)], 393 U.S. 85 (1968), *re-affirmed on rehearing*, 24 N.Y.2d 522, ___ N.E.2d ___, ___ N.Y.S.2d ___ (1969), *petition for federal habeas corpus filed* No. _____ (S.D.N.Y. Aug. __, 1969)(in preparation)(public high school principal held entitled to retain combination and search student locker at any time);

Donaldson v. Mercer, ___ Cal. App. 2d ___, ___ Cal. Rptr. ___ (Dist. Ct. App. 1969)(same);

People v. Kelly, 195 Cal. App. 2d 669, 16 Cal. Rptr. 177 (Dist. Ct. App. 1961)(master of dormitory may consent to police search of student's room at any time - case involved emergency);

State v. Bradbury, ___ N.H. ___, ___ A.2d ___ (1968) (search warrant for coed's room does not cover search of man found there).

B. The Student's Right to Privacy in His Records, Associations, and Reputation

Joint Statement:

Separation of academic and disciplinary records.

Disciplinary records not available to unauthorized persons, except under legal compulsion or in emergency.

No records on political activities and beliefs.

Personal information confidential.

Court Decisions:

Strank v. Mercy Hospital of Johnston, 383 Pa. 54, 117 A.2d 697 (1955)(expelled nursing student entitled as of right to transcript for transfer purposes);

Vigil v. Rice, 74 N.M. 693, 397 P.2d 719 (1964) (libel action against school physician successful where he reported that 13 year old student pregnant, but made no correction when proved false - malice);

Everest v. McKenny, 195 Mich. 649, 162 N.W. 277 (1917) (President of Normal School not liable for slander - told student's landlord that she had loose morals - no malice found, but good faith);

Baskett v. Crossfield, 190 Ky. 751, 228 S.W. 673 (1920) (President's letter to student's parents privileged);

see also Morris v. Rousos, 397 S.W.2d 504 (Tex. Civ. App. 1965).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ROBERT TRACY HOWARD, III, an Infant,
by his parent
ALENA HOWARD, and
KELLY SAMUEL RICKS, III, and Infant,
by his parent
MARY RICKS,

Petitioners,

-against-

GEORGE CLARK,
as Superintendent of Schools of the
City of New Rochelle, and
JAMES K. BISHOP, DAVID STREGER,
RAMOND D. CALGI, LILA N. CAROL,
FRANK H. CONNELLY, JAMES N. DANDRY,
STANLEY H. GODSEY, GEORGE S. HILLS
and MRS. HOWARD B. KANE,
as Members of the Board of Education of
the City of New Rochelle,

Respondents.

PETITION
FOR JUDGMENT
UNDER CPLR
ARTICLE 78

Index No.

Petitioners, complaining of the respondents, by The Legal Aid Society of Westchester County, Antone G. Singsen, III, and Bernard Clyne, of counsel, their attorney, allege:

1. Petitioner Robert Tracy Howard, III, an infant seventeen years of age, resides with his mother, Alena Howard, at 60 Horton Avenue, New Rochelle, New York.

2. Petitioner Howard was, until March 11, 1969, a full-time student at New Rochelle High School in his eleventh-grade year.

3. Petitioner Kelly Samuel Ricks, III, an infant seventeen years of age, resides with his mother, Mary Ricks, at 81 Winthrop Avenue, New Rochelle, New York.

4. Petitioner Ricks was, until Wednesday, March 12, 1969, a full-time student at New Rochelle High School in his eleventh-grade year.

5. On information and belief, respondent George Clark is the Superintendent of Schools of the City of New Rochelle and is charged with the duty, among others, of imposing and continuing suspension of students from New Rochelle High School pursuant to the Education Law of the State of New York and the Rules and Regulations of the Board of Education of the City of New Rochelle.

6. On information and belief, respondents James K. Bishop, David Streger, Ramond D. Calgi, Lila N. Carol, Frank H. Connelly, James N. Dandry, Stanley H. Godsey, George S. Hills and Mrs. Howard B. Kane are members of the Board of Education of the City of New Rochelle and are charged with the duty, among others, of making lawful rules and regulations for the administration of the schools of the City of New Rochelle, including, among said rules and regulations, those pertaining to suspension of students from New Rochelle High School.

7. That this action is brought on behalf of the above-named petitioner Robert Tracy Howard, III, an infant, by Alena Howard, his mother.

8. That this action is brought on behalf of the above-named petitioner Kelly Samuel Ricks, III, an infant, by Mary Ricks, his mother.

9. On the afternoon of Monday, March 10, 1969, the petitioners were arrested in Mamaroneck, New York, by police officers of that jurisdiction, for criminal possession of a dangerous drug in the fourth

degree and criminal possession of a hypodermic instrument.

10. Neither of the petitioners has ever before been either arrested, tried or convicted of any criminal offense.

11. On Tuesday, March 11, 1969, a story relating the arrest of the petitioners appeared in the New Rochelle Standard Star.

12. On information and belief based upon the relation of petitioner Howard, he was directed on the afternoon of Tuesday, March 11, 1969, by Assistant Principal Daily not to report to school on the following day because he had been suspended. Since that day, petitioner Howard has not been in school and has not been receiving any education.

13. On information and belief based upon the relation of petitioner Ricks, he came to school on the morning of Wednesday, March 12, 1969, discovered his name on the school's "suspension list," left school and has not returned. Since Tuesday, March 11, 1969, petitioner Ricks has not been receiving any education.

14. The petitioners have repeatedly stated that they wish to return to school at once and that they feel that every day that they are out of school is a severe, immediate and irreparable injury both to their present state of education and to their ability to be successful in future education and in life.

15. On Monday, March 17, 1969, a letter to Alena Howard from Principal Adolf Panitz, stating that petitioner Howard was suspended from school and that Mrs. Howard should come to see Principal Panitz to discuss her son's future, was received in the Howard's mail. (A copy of the letter is attached as Exhibit 2.)

16. On Friday, March 14, 1969, a letter from Principal Adolf Panitz, stating that petitioner Ricks was suspended from school and that Mrs. Ricks should come to see Principal Panitz to discuss her son's future, was received by mail by Mary Ricks. (A copy of the letter is attached as Exhibit 3.)

17. On Friday, March 14, 1969, with the assistance of Mr. Napolean Holmes, Director of the New Rochelle Community Organization Program, a meeting was arranged for the morning of Monday, March 17, 1969.

18. On Monday, March 17, 1969, a meeting was held in the office of Superintendent Clark. Present were Superintendent Clark, the petitioners, their mothers, Mr. Holmes, Rev. Andrew Whitted, President of the New Rochelle Branch of the National Association for the Advancement of Colored People, and Mrs. Bertha White, Chairman of the Education Committee of the New Rochelle National Association for the Advancement of Colored People.

19. At the above-mentioned meeting, Superintendent Clark informed the petitioners and their parents that the petitioners had been suspended solely because of the existence of criminal charges against them.

20. Superintendent Clark further informed petitioners and their parents that the suspension was based solely upon Resolution No. 69-323, adopted by the Board of Education of the City of New Rochelle on January 7, 1969, which provides, in part: "...the Superintendent shall suspend any student upon his indictment or arraignment in any court, or upon the institution of proceedings in the Family

Court, for any criminal act of a nature injurious to other students or school personnel..." (A copy of the resolution and attendant discussion before the Board of Education is attached as Exhibit 1.)

21. No trial or hearing has as yet been held on the pending criminal charges against the petitioners, and no evidence has been introduced either in the Mamaroneck court or before the Superintendent to substantiate the charges.

22. The acts alleged as a basis for the criminal charges took place off school property, in another town and not during school hours.

23. No evidence has been offered at any time in any place to show the relation to school conduct that the acts alleged as a basis for the criminal charges are purported to have.

24. On information and belief based upon his own statements, the Superintendent is acting solely on the basis of Resolution No 69-323, which makes no attempt to require any relationship between alleged criminal acts and school matters, and which does not require any investigation into the facts on which the criminal charge is based.

25. At no time has the Superintendent alleged that the petitioners have been insubordinate or disorderly, or that their physical or mental condition endangers the health, safety or morals of the petitioners or of other minors.

26. The suspension imposed by Superintendent Clark, pursuant to the resolution adopted by the Board of Education of the City of New Rochelle, is unlawful and invalid for the following reasons:

a. The suspensions and the resolution upon which they are based violate the Fourteenth Amendment to the Constitution of the United States and Article I, Section 14, of the Constitution of the State of New York, in that they deprive petitioners of the equal protection of the laws to which they are entitled by arbitrarily, capriciously and invidiously discriminating against all persons, including petitioners, charged with criminal acts without any proof that any acts were committed that in any way relate to education;

b. The suspensions and the resolution upon which they are based violate the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 2 and 6 of the Constitution of the State of New York in that they condemn, penalize and punish all those who are charged with criminal acts, including petitioners, before they have been given a fair trial according to due process of law, allowed to confront witnesses against them and found guilty;

c. The suspensions and the resolution upon which they are based, for the reasons above stated, are against the public policy of the United States and the State of New York as that policy is embodied in the presumption of innocence in criminal cases which is properly protected in both jurisdictions; and

d. The suspensions and the resolution upon which they are based are beyond the powers conferred upon a Superintendent of Schools or upon a Board of Education by the Education Law of the State of New York.

27. No previous application for the relief sought herein has been made.

WHEREFORE, petitioners demand judgment declaring Resolution No. 69-323 of the Board of Education of the City of New Rochelle null, void and of no effect and ordering the respondent Superintendent of Schools to permit petitioners to attend New Rochelle High School forthwith as full time students in their eleventh year, and granting petitioners such other and further relief as to the Court may seem just and proper.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

--x

ROBERT TRACY HOWARD III et ano,

Petitioners

INDEX NO.

-against

2740/69

GEORGE CLARK et al

Respondents

--x

DOUGLAS HERMAN, an infant
by his Parents, LESTER HERMAN and
ELIZABETH HERMAN,

Intervenors

-against-

GEORGE CLARK et al

Respondents

--x

GRADY, J.

This is an article 78 proceeding to compel respondents to reinstate the infant petitioners as full time students in the New Rochelle High School. The infant petitioners were suspended indefinitely pursuant to the New Rochelle School Board Resolution No. 69-323 on March 17, 1969, on the grounds that they had been arrested on March 10, 1969, by the Mamaroneck police and charged with the criminal possession of a hypodermic instrument. It is apparent that the Superintendent of Schools relied upon that portion of Board of Education Resolution No. 69-323 which mandates suspension of "any student upon his indictment or arraignment in any court...for any criminal act of a nature injurious to other students or school personnel..."

Education Law Section 3214 (6) (a) provides that suspension can only be invoked upon the following minors:

> "The school authorities, the superintendent of schools, or district superintendent of schools may suspend the following minors from required attendance upon instruction:
>
> (1) A minor who is insubordinate or disorderly;
>
> (2) A minor whose physical or mental condition endangers the health, safety, or morals of himself or of other minors;
>
> (3) A minor who, as determined in accordance with the providions of part one of this article, is feeble-minded to the extent that he cannot benefit from instruction."

The respondents contend that the validity of the challenged resolution may not be lawfully determined in an article 78 proceeding and that petitioners have not exhausted their administrative remedies of appeal to the Commissioner of Education under Education Law Section 310.

It has been held that mandamus will lie commanding the admission to classes of an excluded pupil where the controversy turns on the interpretation of a statute. Crispell v. Rust, 149 Misc. 464, 267 N.Y.S. 656.

The cases cited by respondents are not applicable to the facts in the case before the court since those cases did not involve the interpretation of a statute.

The question which is raised in this proceeding is whether the respondents in suspending the infant petitioners under Resolution 69-323 of the New Rochelle Board of Education went beyond the powers conferred upon by the Superintendent of Schools and the Board of Education under section 3214 (6) (a) of the Education Law.

Respondents argue that the Resolution was within the powers conferred by section 2503 (2) (3) of the Education Law which gives power to the Board of Education to prescribe such regulations as may be necessary to make effectual the provisions of the Education Law for the general management operation, control, maintenance and discipline of the schools. Since section 3214 (6) (a) Education Law specifically defines the grounds for suspension of a student, the powers of the Board of Education are limited in suspension cases to these grounds.

The respondents allege that the Superintendent of Schools suspended petitioners for the reason that: "possession by a high school student of heroin and of a hypodermic syringe for injection of the drug into the bloodstream regardless of where offense is committed identified offender as a person whose conduct and mental condition endanger the safety, morals, health and welfare of other high school students with whom he would associate in the school."

While the use of heroin by students off the high school premises bears a reasonable relation to and may endanger the health, safety and morals of other students, the bare charges against petitioners of possession of heroin do not justify suspension of petitioners on the grounds set forth in section 3214 (6) (a) that they are insubordinate or disorderly; nor that their physical or mental condition endangers the health, safety or morals of themselves or other minors.

The court finds that the respondents have exceeded the powers conferred upon them by the Education Law in suspending the infant petitioners on the ground that they have been accused of possession of heroin. Until the legislature amends the Education Law, suspension of a student should be done pursuant to a strict interpretation and application of section 3214 (6) (a) of the Education Law.

The court need not decide the constitutional issues raised by petitioners since petitioners are entitled to the relief they seek on the ground that the New Rochelle Board of Education exceeded its powers under the Education Law in suspending the infant petitioners.

The application of the intervenors to intervene in this proceeding is denied. However, since it appears that the infant Douglas Herman was suspended for five (5) days for being charged with possession of marijuana off school grounds, and his suspension has terminated, his intervention herein is now moot, but based on the within decision, the record of his suspension should be expunged from the school records.

The petition is granted and the Board of Education of the City of New Rochelle is ordered to permit petitioners to attend New Rochelle High School forthwith as full time students and the record of their suspensions should be expunged from the school records.

Submit order on notice.

Dated: March 25, 1969

W. Vincent Grady
JUSTICE SUPREME COURT

TO: THE LEGAL AID SOCIETY OF WESTCHESTER COUNTY
Attorney for Petitioners
56 Grand Street
White Plains, New York 18601

GAYNOR, FREEMAN, GLICK, & PISANI, ESQS.
Attorneys for Intervenor-Petitioners
271 North Avenue
New Rochelle, New York

F. HARRY OTTO, ESQ.
Attorney for Respondents
271 North Avenue
New Rochelle, New York

deemed such an intelligent and understanding waiver as to justify withholding of federal habeas corpus relief. 28 U.S.C.A. § 2254.

2. Habeas Corpus 🔑**45.3(7)**

Exhaustion requirement for relief by way of federal habeas corpus is limited in its application to failure to exhaust state remedies still open to habeas applicant at time he files his application in federal court. 28 U.S.C.A. § 2254.

3. Criminal Law 🔑**997(7)**

Coram nobis in Alabama does not lie to enable an accused to have a reconsideration of matters in issue and determined by trial court in original proceeding.

4. Habeas Corpus 🔑**45.3(9)**

Issue concerning validity of challenged searches and seizures could not be said to have been presented by prisoners to state Supreme Court in fulfillment of exhaustion requirement for federal habeas corpus, where prisoners failed to include any transcript of evidence in their appeals, so that review was necessarily confined to record proper. 28 U.S.C.A. § 2254.

5. Searches and Seizures 🔑**7(10)**

A student who occupies a college dormitory room enjoys the protection of the Fourth Amendment. U.S.C.A.Const. Amend. 4.

6. Colleges and Universities 🔑**9**
Habeas Corpus 🔑**25.1(2)**

Regulation of university authorizing entry into students' dormitory rooms for purpose of making a search was reasonable, so long as it was limited in its application to furtherance of university's function as an educational institution, but once regulation was applied so as to authorize a search of students' rooms for criminal evidence, regulation constituted an unconstitutional attempt to require students to waive their protection from unreasonable searches and seizures as a condition to their occupancy of rooms and entitled students to relief by way of federal habeas corpus. U.S.C.A.Const. Amend. 4; 28 U.S.C.A. § 2254.

MacDonald Gallion, Atty. Gen., Richard F. Calhoun, Asst. Atty. Gen., Montgomery, Ala., for respondents-appellants.

Morris S. Dees, Jr., Joseph J. Levin, Jr., Levin & Dees, Montgomery, Ala., for petitioners-appellees.

Before RIVES, THORNBERRY and CLARK, Circuit Judges.

RIVES, Circuit Judge:

The district court granted habeas corpus to two Alabama prisoners and ordered their release. Piazzola and Marinshaw v. Watkins, M.D.Ala.1970, 316 F. Supp. 624. The appellants advance two contentions for reversal: (1) that the appellees have not exhausted the remedies available in the courts of the State as required by 28 U.S.C. § 2254; and (2) that the search and seizure which the district court found to be violative of appellees' Fourth Amendment rights were made pursuant to a constitutionally reasonable school regulation permitting such searches and seizures. We affirm.

By separate jury trials, each of the appellees was convicted of the offense of illegal possession of marijuana in the Circuit Court of Pike County, Alabama, and was sentenced to imprisonment for a period of five years. Each appealed to the Court of Appeals of Alabama, but each failed to comply with Title 7, Section 827(1), Code of Alabama 1940 and to include a transcript of evidence in his appeal. Necessarily the state appellate courts were confined to review of matters contained in the record proper. The State Court of Appeals affirmed both convictions without opinion, and the State Supreme Court granted motions to strike their petitions for certiorari. Marinshaw v. State of Alabama, 1968, 45 Ala.App. 723, 221 So.2d 121; 1968, 284 Ala. 4, 221 So.2d 121; Piazzola v. State of Alabama, 1968, 45 Ala.App. 723, 221 So.2d 404; 1968, 284 Ala. 39, 221 So.2d 404. Their habeas corpus petition to the federal district court was submitted on a stipulation of facts which included, as Exhibit 1, a transcript of the testimony taken in the State Circuit Court on their motion to suppress evidence, and which further stipulated that "The only evidence against Petitioners is the marijuana allegedly found as a result of the search described in Exhibit 1."

The district court condensed the transcript of testimony into the following findings of fact:

> "On the morning of February 28, 1968, the Dean of Men of Troy State University was called to the office of the Chief of Police of Troy, Alabama, to discuss 'the drug problem' at the University. Two State narcotic agents and two student informers from Troy State University were also present. Later on that same day, the Dean of Men was called to the city police station for another meeting; at this time he was informed by the officers that they had sufficient evidence that marijuana was in the dormitory rooms of certain Troy State students and that they desired the cooperation of University officials in searching these rooms. The police officers were advised by the Dean of Men that they would receive the full cooperation of the University officials in searching for the marijuana. The informers, whose identities have not yet been disclosed, provided the police officers with names of students whose rooms were to be searched. Still later on that same day (which was during the week of final examinations at the University and was to be followed by a week-long holiday) the law enforcement officers, accompanied by some of the University officials, searched six or seven dormitory rooms located in two separate residence halls. The rooms of both Piazzola and Marinshaw were searched without search warrants and without their consent. Present during the search of the room occupied by Marinshaw were two State narcotic agents, the University security officer, and a counselor of the residence hall where Marinshaw's room was located. Piazzola's room was searched twice. Present during the first search were two State narcotic agents and a University official; no evidence was found at this time. The second search of Piazzola's room, which disclosed the incriminating evidence, was conducted solely by the State and City police officials.
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> "At the time of the seizure the University had in effect the following regulation:
>
> > The college reserves the right to enter rooms for inspection purposes. If the administration deems it necessary, the room may be searched and the occupant required to open his personal baggage and any other personal material which is sealed.
>
> Each of the petitioners was familiar with this regulation. After the search of the petitioners' rooms and the discovery of the marijuana, they were arrested, and the State criminal prosecutions and convictions ensued."

316 F.Supp. at 625.

1. *Exhaustion of State Remedies*

[1, 2] Appellees' failure to perfect their respective appeals in a manner which would have required review of the validity of the search and seizure, under the circumstances of this case, does not support an inference of deliberate bypassing of the state court system, nor can it be deemed such an intelligent and understanding waiver as to justify the withholding of federal habeas corpus relief. Fay v. Noia, 1963, 372 U.S. 391, 399, 83 S.Ct. 822, 9 L.Ed.2d 837. Further, their failure effectively to seek review by appeal was not a failure to exhaust "the remedies available in the courts of the State" as required by 28 U.S.C. § 2254, because that requirement "is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court." *Id.* 372 U.S. at 434, 435, 83 S.Ct. at 847.

A petition for habeas corpus is rarely an effective post-conviction remedy in Alabama for a habeas petition by a state prisoner calls for the very limited inquiry of whether " * * * the court proceeding and conviction under which the prisoner is held are of a court of competent jurisdiction and are regular on their face, it is not permissible to impeach the court's jurisdiction by parol testimony." Vernon v. State, 1941, 240 Ala. 577, 200 So. 560, 563, quoted in Johnson v. Williams, 1943, 244 Ala. 391, 13 So.2d 683, 685; accord, Griffin v. State, 1953, 258 Ala. 557, 63 So.2d 682, 683.

[3] The broader Alabama post-conviction remedy of writ of error coram nobis is not available because "* * * errors concerning facts known to the court with reference to which the court acted at the time of the trial are not reviewable." Johnson v. Williams, *supra*, 13 So.2d at 686; accord, Duncan v. State, 1964, 42 Ala.App. 509, 169 So.2d 439, 441; Woodard v. State, 1965, 42 Ala.App. 552, 171 So.2d 462, 463, 468. There are no new facts to be presented by coram nobis. The state trial court heard evidence on the claimed illegal search and seizure and denied the appellees' timely filed motion to suppress evidence. Coram nobis does not lie to enable an accused to have a reconsideration of matters in issue and determined by the trial court in the original proceeding. 24 C.J.S. Criminal Law § 1606(10), pp. 705, 706.

[4] The district court properly held that the appellees had exhausted the remedies available to them in the courts of the State of Alabama as required by 28 U.S.C. § 2254.[1]

2. *Validity of Search and Seizure*

The Fourth Amendment protects "the right of the *people* to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures" (emphasis added). The question is whether in the light of all of the facts and circumstances, including the University regulation, the search which disclosed the marijuana was an unreasonable search. The district judge made reasonableness the touchstone of his opinion as to the validity of the search. We find ourselves in agreement with his view that this search was unreasonable.

In a case where the facts were similar, People v. Cohen, 57 Misc.2d 366, 292 N.Y.S.2d 706, aff'd, 61 Misc.2d 858, 306 N.Y.S.2d 788, Judge Burstein said:

> "The police and the Hofstra University officials admitted that they entered the room in order to make an arrest, if an arrest was warranted. This was, in essence, a fishing expedition calculated to discover narcotics. It offends reason and logic to suppose that a student will consent to an entry into his room designed to establish grounds upon which to arrest him. Certainly, there can be no rational claim that a student will self-consciously waive his Constitutional right to a lawful search and seizure. Finally, even if the doctrine of implied consent were imported into this case, the consent is given, not to police officials, but to the University and the latter cannot fragmentize, share or delegate it."

Another case somewhat in point on the facts is Commonwealth v. McCloskey, Appellant, 1970, 217 Pa.Super. 432, 272 A.2d 271. There the court reversed a student's marijuana conviction because the policemen who entered his dormitory room to execute a search warrant did not knock or announce their presence and purpose before entering. In part, Judge

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[1] We do not, however, agree with one ground for that holding as stated by the district court: "Furthermore, it affirmatively appears that petitioners have already raised the illegal search and seizure issue before the Alabama Supreme Court. Since they have done so, it is not necessary that they attempt to do so again through collateral proceedings. Brown v. Allen, Warden, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953)." 316 F.Supp. at 625. Because Marinshaw and Piazzola failed to include any transcript of evidence in their appeals, review was necessarily confined to the record proper, and the illegal search and seizure issue was not presented to either of the appellate courts of the State.

Cercone speaking for the majority of the court said:

> "It was the Commonwealth's position that the Fourth Amendment protections do not apply to a search of a college dormitory room. The test to be used in determining the applicability of the Fourth Amendment protections is whether or not the particular locale is one '* * * in which there was a reasonable expectation of freedom from governmental intrusion': Mancusi v. DeForte, 392 U.S. 364, 368, 88 S.Ct. 2120, 2124, 20 L.Ed.2d 1154, 1159 (1968) (large office room shared by the defendant and other union officials). See also Sabbath v. United States, supra [391 U.S. 585, 88 S.Ct. 1755, 20 L.Ed.2d 828] (apartment); Stoner v. California, 376 U.S. 483, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964), rehearing denied 377 U.S. 940, 84 S.Ct. 1330, 12 L.Ed.2d 303 (hotel room); and Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (telephone booth). A dormitory room is analogous to an apartment or a hotel room. It certainly offers its occupant a more reasonable expectation of freedom from governmental intrusion than does a public telephone booth. The defendant rented the dormitory room for a certain period of time, agreeing to abide by the rules established by his lessor, the University. As in most rental situations, the lessor, Bucknell University, reserved the right to check the room for damages, wear and unauthorized appliances. Such right of the lessor, however, does not mean McCloskey was not entitled to have a 'reasonable expectation of freedom from governmental intrusion' or that he gave consent to the police search,[1] or gave the University authority to consent to such search.[2]

In the case of Katz v. United States, 1967, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576, to which Judge Cercone referred, the Court commented at some length on the concept of "constitutionally protected areas":

> "The petitioner has strenuously argued that the booth was a 'constitutionally protected area.' The Government has maintained with equal vigor that it was not.[3] But this effort to decide

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"[1]. Voluntary consent must be proven by clear and positive evidence [United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), cert. denied 372 U.S. 906, 83 S.Ct. 717, 9 L.Ed.2d 716 (1963)], and the State has the burden of proof [Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797, 802 (1968)]. Waiver of Fourth Amendment rights through consent to a search cannot be lightly inferred. See Simmons v. Bomar, 349 F.2d 365, 366 (6th Cir. 1965); United States v. Como, 340 F.2d 891, 893 (2d Cir. 1965). Every reasonable presumption is against one's waiver of his constitutional rights. Weed v. United States, 340 F.2d 827, 829 (10th Cir. 1965).

"[2]. In Stoner v. California, supra, a hotel clerk allowed the police to search a guest's room, and the Supreme Court there stated: 'It is important to bear in mind that it was the petitioner's constitutional right which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent.' 376 U.S. at 489, 84 S.Ct. at 893, 11 L.Ed.2d at 860. Many other cases have held that one in the position of a lessor cannot consent to a police search of a tenant's premises, even though the lessor, himself has a right to enter the room or apartment. See United States v. Jeffers, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951) and Commonwealth v. Ellsworth, 421 Pa. 169, 218 A.2d 249 (1966) (hotel proprietor let police into a guest's room); Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) and Cunningham v. Heinze, 352 F.2d 1 (9th Cir. 1965) cert. denied 383 U.S. 968, 86 S.Ct. 1274, 16 L.Ed. 2d 309 (1966) (landlord allowed police search of tenant's room)."

"[8]. In support of their respective claims, the parties have compiled competing lists of 'protected areas' for our consideration. It appears to be common ground that a private home is such an area, Weeks v. United States, 232 U.S. 383, [34 S.Ct. 341, 58 L.Ed. 652], but that an open field is not. Hester v. United States, 265 U.S. 57, [44 S.Ct. 445, 68 L.Ed. 898. Defending the inclusion of a telephone booth in his list the petition cites United States v. Stone, D.C., 232 F.Supp. 396, and United States v. Madison, 32 L.W. 2243 (D.C.Ct.Gen.Sess.). Urging that the telephone booth should be excluded, the Government finds support in United States v. Borgese, D.C., 235 F.Supp. 286.

whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case.[9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210 [87 S.Ct. 424, 17 L.Ed.2d 312]; United States v. Lee, 274 U.S. 559, 563, [47 S.Ct. 746, 71 L.Ed. 1202]: But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. See Rios v. United States, 364 U.S. 253 [80 S.Ct. 1431, 4 L.Ed.2d 1688]; Ex parte Jackson, 96 U.S. 727, 733 [24 L.Ed. 877].

"9. It is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas,' see, *e. g.*, Silverman v. United States, 365 U.S. 505, 510, 512, [81 S.Ct. 679, 5 L.Ed.2d 734]; Lopez v. United States, 373 U.S. 427, 438–439, [83 S.Ct. 1381, 10 L.Ed.2d 462]; Berger v. New York, 388 U.S. 41, 57, 59, [87 S.Ct. 1873, 18 L.Ed.2d 1040], but we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.

"The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. * * *"

"10. Silverthorne Lumber Co. v. United States, 251 U.S. 385, [40 S.Ct. 182, 64 L.Ed. 319].

"11. Jones v. United States, 362 U.S. 257, [80 S.Ct. 725, 4 L.Ed.2d 697].

"12. Rios v. United States, 364 U.S. 253, [80 S.Ct. 1431, 4 L.Ed.2d 1688]."

389 U.S. at 351–352, 88 S.Ct. at 511.

[5, 6] By a similar process of reasoning, we must conclude that a student who occupies a college dormitory room enjoys the protection of the Fourth Amendment. True the University retains broad supervisory powers which permit it to adopt the regulation heretofore quoted, provided that regulation is reasonably construed and is limited in its application to further the University's function as an educational institution.[2] The regulation cannot be construed or applied so as to give consent to a search for evidence for the primary purpose of a criminal prosecution.[3] Otherwise, the regulation itself would constitute an unconstitutional attempt to require a student to waive his protection from unreasonable searches and seizures as a condition to his occupancy of a college dormitory room. Com-

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[2] One of the "Residence Hall Policies" of this University provides that "College men are assumed to be mature adults with acceptable and established habits." Another adjures students, "Keep rooms locked at all times." The University thus recognized that it cannot exercise that strict control of its students which might be permitted in a boys' school where an "in loco parentis" standard would be more appropriate.

[3] See the authorities cited in footnote 1 of Commonwealth v. McCloskey, Appellant, quoted *supra*.

pare Tinker v. Des Moines Independent Community School District, 1969, 393 U.S. 503, 506, 89 S.Ct. 733, 21 L.Ed.2d 731. Clearly the University had no authority to consent to[4] or join in a police search for evidence of crime.[5]

The right to privacy is "no less important than any other right carefully and particularly reserved to the people." Mapp v. Ohio, 1961, 367 U.S. 643, 657, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081. The results of the search do not prove its reasonableness. This search was an unconstitutional invasion of the privacy both of these appellees and of the students in whose rooms no evidence of marijuana was found. The warrantless search of these students' dormitory rooms cannot be justified. The judgment is therefore

Affirmed.

CLARK, Circuit Judge (concurring in part and dissenting in part).

I respectfully dissent from part 2 of the Court's opinion as to the defendant, Marinshaw. The college had a direct interest in keeping its dormitories free of the specific criminal activity here involved—the possession of the drug, marihuana. The regulation was a reasonable means of embodying this interest. *Cf.* Pratz v. Louisiana Polytechnic Institute, 316 F.Supp. 872 (D.C.W.D.La., 1970), aff. 401 U.S. 1004, 91 S.Ct. 1252, 28 L.Ed. 2d 541 (1971). Marinshaw was found to be familiar with the regulation. When he chose to place the evidence of this criminal conduct in his dormitory room he knowingly exposed this material to inspections by officials of the University. He cannot now reinstate as private an area he had agreed was thus accessible. A publicly owned dormitory room is not in my mind the equivalent of a private rooming house. I concur in the result as to the defendant, Piazzola, because I do not believe the regulation can be validly construed to authorize the college to consent to an independent police search.

In all other respects I concur in the opinion of the majority.

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[4] See the authorities cited in footnote 2 of Commonwealth v. McCloskey, Appellant, quoted *supra*.

ED 071 195 **STUDENT RIGHTS LITIGATION PACKET. REVISED EDITION.**

HARVARD UNIV., CAMBRIDGE, MASS. CENTER FOR LAW AND EDUCATION. APR 72.

450P.

CORPORAL PUNISHMENT

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF MASSACHUSETTS

WILLIE MURPHY; RACHAEL RUFFIN, a minor, by her mother and next friend, WILLIE MURPHY; AGNESS WATTS; JEANNETTE WATTS and JAMES WATTS, minors, by their mother and next friend, AGNES WATTS; ROSE HICKS; MARGARET POPULO, a minor by her mother and next friend, ROSE HICKS.

Plaintiffs

vs.

JOHN T. KERRIGAN, individually, and in his capacity as Chairman of the Boston School Committee; THOMAS S. EISENSTADT, JOSEPH LEE, PAUL F. McDEVITT and PAUL T. TIERNEY individually, and in their capacity as members of the Boston School Committee; WILLIAM OHRENBERGER, individually, and in his capacity as Superintendent of the Boston Public Schools; JOSEPH McDONOUGH, individually, and in his capacity as principal of the Patrick F. Gavin School; and EDWARD SULLIVAN, HARVEY BERLIN and FRANK CELONA, individually, and in their capacity as teachers in the Boston school system.

CIVIL ACTION
No. CA-69-1174-W

AMENDED COMPLAINT

1. PRELIMINARY STATEMENT

In this civil action, parents and students seek a declaration that corporal punishment in the public schools is unconstitutional, and they seek to invoke this Court's equitable powers to prevent the further use of corporal punishment in the Patrick F. Gavin School, a public junior high school within the city of Boston.

2. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. SS1331, 1343 (3), and 1343 (4). This action arises under the First, Fourth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C.A. S1983. The matter in controversy exceeds the sum of $10,000 exclusive of interests and costs. The action seeks injunctive and damage relief pursuant to 42 U.S.C.A. S1983 and declaratory relief pursuant to 28 U.S.C.A. SS2201 and 2202.

3. PARTIES

A. Plaintiffs

All plaintiffs are citizens of the United States and of the Commonwealth of Massachusetts and reside in the City of Boston. All minor plaintiffs are students at the Patrick F. Gavin School.

(1) Rachael Ruffin is a minor girl and Willie Murphy is her mother and next friend.

(2) Jeannette Watts is a minor girl and James Watts is a minor boy and Agnes Watts is their mother and next friend.

(3) Margaret Populo is a minor girl and Rose Hicks is her mother and next friend.

B. Administrative Defendants

(1) Defendants Eisenstadt, Kerrigan, Lee, McDevitt and Tierney are the sole current members of the Boston School Committee, the governmental body charged with general responsibility for the operation and management of all public schools in the City of Boston, M.G.L.A. Chapter 71, Section 35 et. seq.

(2) Defendant William Ohrenberger is the Superintendent of the Boston Public Schools and thereby the chief executive officer of the School Committee, responsible for the general management and supervision of the Boston Public Schools. M.G.L.A. Chapter 71, Section 59.

(3) Defendant Joseph McDonough is a Principal duly appointed by the Boston School Committee and assigned to the Patrick F. Gavin School, a public school under the control and within the jurisdiction of the Boston School Committee.

C. Teacher Defendants

(1) Defendant Edward Sullivan is a duly appointed teacher in the Boston School System, assigned to the Patrick F. Gavin School.

(2) Defendant Harvey Berlin is a duly appointed teacher in the Boston School System, assigned to the Patrick F. Gavin School.

(3) Defendant Frank Colona is a duly appointed teacher in the Boston School System, assigned to the Patrick F. Gavin School.

4. CLASS

Pursuant to Rule 23 of the Federal Rules of Civil Procedure, plaintiffs sue on their own behalf and on behalf of others similarly situated. The class represented by plaintiffs consists of approximately 1,235 students, the parents of said students in the Patrick F. Gavin school, and all those persons who may become students and parents of students at the Patrick F. Gavin School. The class is so numerous that joinder of all members is impracticable. There are questions of law and fact common to the class. The representative plaintiffs will fairly and adequately protect the interests of the class. The parties defendant have acted or refused to act on grounds generally applicable to all persons within the class, thereby making final injunctive and declaratory relief appropriate with respect to the class as a whole. The questions of law or fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

5. STATEMENT OF FACTS

All incidents of corporal punishment and abuse described in this complaint occurred at the Patrick F. Gavin School while school was in session. All teacher defendants' conduct was undertaken in their capacity as teachers and under color of state law. All teacher defendants inflicted corporal punishment maliciously, in bad faith, and with full knowledge that their conduct violated school department Regulations and/or other laws. All corporal punishment inflicted was excessive and not a proportionate response to any conduct of the plaintiff students. All administrative defendants knew or should have known that corporal punishment was and is inflected in the Patrick F. Gavin School and all administrative defendants failed to take appropriate action to insure the cessation of corporal punishment.

(A) On June 5, 1969, plaintiff Rachael Ruffin was 13 years old and was an eighth grade student at the Patrick F. Gavin School. On or about that date, teacher defendant Edward Sullivan pushed and slapped Rachael Ruffin allegedly for school disciplinary reasons.

(B) On or about June 6, 1969, plaintiff Willie Murphy met with defendant Joseph McDonough, principal of the Gavin School at his office to discuss the beating defendant Sullivan had given her daughter Rachael Ruffin the day before.

At this meeting, Teacher defendant Edward Sullivan, in the presence of defendant McDonough, grabbed and shook plaintiff Willie Murphy and subjected her to verbal abuse.

(C) On October 29, 1969, plaintiff Jeannette Watts was 14 years old and a student at the Patrick F. Gavin School. On or about that date teacher defendant Edward Sullivan struck Jeannette Watts allegedly for school disciplinary reasons.

(D) On or about the same date, teacher defendant Harvey Berlin roughly grabbed Jeannette Watts and slapped her allegedly for school disciplinary reasons.

(E) On October 29, 1969, plaintiff James Watts was 13 years old and a student at the Patrick F. Gavin School. On or about that date, teacher defendant Frank Celona struck James Watts on his hands with a rattan allegedly for disciplinary reasons. No principal or teach was present when this punishment was inflicted.

(F) On or about the same date, teacher defendant Edward Sullivan struck, grabbed, pushed, and verbally abused James Watts allegedly for school disciplinary reasons.

(G) On October 29, 1969, plaintiff Margaret Populo was 14 years old and a ninth grade student at the Patrick F. Gavin School. On or about that date, teacher defendant Harvey Berlin struck plaintiff Populo allegedly for school disciplinary reasons.

(H) Teacher defendants and/or other teachers in the Patrick F. Gavin School have inflicted and continue to inflict corporal punishment upon other plaintiffs within the class. Because corporal punishment is and has been regularly utilized as a means of discipline within the Patrick F. Gavin School, the plaintiffs believe and fear that its use will continue unless this Court intervenes and enjoins the future use of corporal punishment.

(I) At all times material herein, administrative defendants have authorized corporal punishment for: "Disciplinary reasons"...[in] extreme cases..." Boston School Committee Regulations 211.5-211.7 (attached hereto as Exhibit A and incorporated by reference herein).

(J) Defendants failed to make available any procedural safeguards to plaintiff students before inflicting corporal punishment on them in this case:

1. Defendants failed to notify plaintiff students of what, if any, misconduct they had allegedly engaged in sufficiently before any hearing so that plaintiffs might have had time to prepare their defense.

2. Defendants failed to give plaintiffs any opportunity for a hearing, however informal, to present their side of the alleged misconduct before an impartial referee.

3. Defendants failed to give plaintiffs any opportunity to present witnesses or other evidence in their defense.

4. Defendants failed to give plaintiffs any opportunity to question or cross examine any witnesses against them.

5. Defendants failed to give plaintiffs any opportunity to be represented in any hearing by attorneys, parents, friends or any other person.

6. Defendants failed to notify plaintiff students that they had rights to notice of charges, hearing, and representation.

6. CAUSE OF ACTION

Defendants' conduct in executing, permitting, and/or failing to prevent the inflicting of corporal punishment at the Patrick F. Gavin School violates the Constitution of the United States for the following reasons:

A. The infliction of corporal punishment by public school officials on public school students on its face abridges the"privileges and immunities" of all such students as well as plaintiff students on the facts in this case including their rights to physical integrity, dignity of personality and freedom from arbitrary authority in violation of the Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

B. The infliction of corporal punishment on its face "deprives" all public school students as well as plaintiffs on the facts of this case of "liberty without due process of law" in violation of the Fourteenth Amendment to the United States Constitution since it is arbitrary, capricious and unrelated to achieving any legitimate educational purpose. On the contrary, the use of corporal punishment in the schools results in a hostile reaction to authority, breeds further violence and interferes with the educational process and academic inquiry.

C. The infliction of corporal punishment on public school students on its face constitutes "cruel and unusual punishment" as well as the facts of this case, since it was grossly disproportionate to any misconduct plaintiff students may have engaged in, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

D. The standards adopted by the defendants with respect to inflicting corporal punishment on students:

1. are arbitrary, not rationally related to any legitimate educational purposes and destructive of the educational process;

2. are vague, fail to provide students adequate notice of the prohibited conduct and permit arbitrary enforcement;

3. are overbroad, penalize student conduct protected by the First Amendment and chill the exercise of First Amendment Freedoms; all in violation of the Due Process clause of the Fourteenth Amendment;

5. constitute "cruel and unusual" punishment in violation of the Eighth and Fourteenth Amendments.

E. Defendants' failure to provide plaintiff students in this case any procedural safeguards before inflicting corporal punishment on them, including adequate notice of alleged misconduct, hearing, examination and cross-examination, representation and notice of rights constituted summary punishment and "deprived" plaintiffs of "liberty without due process of law" in violation of the Fourteenth Amendment to the United States Constitution.

F. Defendants' conduct in inflicting corporal punishment on female plaintiffs Rachael Ruffin, Jeannette Watts and Margaret Populo, violated the express provisions of Boston School Committee Regulations which prohibit corporal punishment of girls. The infliction of punishment on male plaintiff James Watts also violated these Regulations because it was excessive, no faculty witness was present and his conduct was not "extreme."

7. IRREPARABLE INJURY

Defendants' past and continuing infliction of corporal punishment on plaintiffs and their class caused and will continue to cause great and irreparable injury to plaintiffs and their class by greatly damaging their education, causing them severe and permanent physical and emotional injury, violating their physical integrity, and destroying their dignity of personality. Further, defendants' past and continuing infliction of corporal punishment on plaintiffs and their class will irreparably injure plaintiffs' fundamental Constitutional rights to be free from arbitrary and capricious governmental actions and irreparably injure the public's interest in ensuring that its fundamental laws are obeyed by government.

8. INADEQUATE LEGAL AND ADMINISTRATIVE REMEDIES

Plaintiffs have no adequate legal or administrative remedies.

WHEREFORE, plaintiffs pray for relief as follows:

1. That a temporary restraining order, preliminary and permanent injunction issue, enjoining and restraining order, preliminary and permanent injunction issue, enjoining and restraining the defendants, their agents, servant and employees from inflicting any form of corporal punishment upon any student at the Patrick F. Gavin School.

2. That a declaratory judgment issue declaring that the Fourth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution prohibits any form or corporal punishment upon any student at the Patrick F. Gavin School.

3. That this Court appoint a special Master to the Patrick F. Gavin School to insure that this Court's orders are enforced and to insure that the Constitutional rights of the plaintiffs are fully respected.

4. That the Master be directed to implement a mechanism for receiving complaints against teachers along the lines of the plan set forth in Exhibit B attached hereto and incorporated by reference herein.

5. That judgment be entered against the defendants, jointly and severally, of $25,000 as to each plaintiff as compensatory and punitive damages, plus interest and costs.

6. For such other relief as the Court deems appropriate.

By their attorneys,

James W. Dolan
Boston Legal Assistance Project
482 Broadway
South Boston, Mass. 02127
268-2272

Gershon Ratner
Boston Legal Assistance Project
84 State Street
Boston, Mass. 02109
742-8930

Michael L. Altman
Boston Legal Assistance Project
474 Blue Hill Avenue
Roxbury, Mass. 02121
442-0211

EXHIBIT A
Boston School Committee Regulations
in effect during 1968-69 and 1969-70 school years

Strike out Sections 209 to 215, inclusive, and substitute in place thereof the following:

Sect. 209.1 Every pupil must come to school clean in his person and properly dressed. The head master or principal may require a pupil to present himself in such dress and personal appearance as shall not be detrimental to the best interests of the school.

2. The possession of switch knives, garrison belts, metallic knuckles, firearms, or any other dangerous weapon is forbidden by law. A pupil who violates this criminal law shall be liable to suspension or expulsion.

Sect. 210.1 Tardiness, unless satisfactorily explained, shall be subject to a proper penalty. Tardy pupils shall present on the next school day an excuse in writing from their parents or guardians, but shall not be sent home to obtain such an excuse. The principal or teacher in charge of a building may request the presence of a parent of a pupil who is frequently tardy.

Sect. 211.1 Before making a final decision in regard to disciplinary action taken by a teacher, the head master or principal shall consult with the teacher concerned and, if necessary, with the pupil and his parent. In problems concerning pupil conduct, the classroom teacher should exercise the authority proper to a parent of good judgment. Although the head master or principal should assist the teacher to meet disciplinary problems, the responsibility for the correction of classroom behavior is the teacher's.

2. The confinement of pupils in a closet or wardrobe, or the exclusion of a pupil to a corridor or any other unsupervised area, or the use on the part of the teacher of sarcastic or discourteous language is forbidden.

3. No physical restraint of any kind shall be used in a kindergarten.

4. A teacher may temporarily exclude from the classroom to the office of the head master or principal a pupil whose continuous misbehavior is such as to prevent a teaching-learning situation for the class. Such exclusion shall continue, but for not more than one school day, until the head master or principal has consulted with the teacher regarding the pupil's status. A pupil who is excluded from the classroom shall be escorted to the office of the head master or principal or to whatever supervised area may be designated by the head master or principal.

5. Corporal punishment may be administered for disciplinary reasons by any teacher or principal. Corporal punishment shall be restricted to boys in day elementary and junior high schools and in the M. Gertrude Godvin School; shall be confined to blows on the hand with a rattan and in the presence of a competent witness, who shall be either the principal or a teacher designated in sight of other pupils; provided, that corporal punishment shall not be inflicted when it might aggravate an existing physical impairment or produce permanent or lasting

injury; provided further, that it shall be resorted to only in extreme cases and after the nature of the offense has been fully explained to the offending pupil. Violent shaking or other gross indignities are expressly forbidden.

6. Cases of corporal punishment shall be reported by each teacher on the dates of their occurrence, in writing to the principal of the district These reports shall state the name of the pupil, the name of the witness, the amount of punishment, and the reason therefor. These reports, together with those cases of corporal punishment inflicted by the principals, shall be kept on file for two years, at the expiration of which time they shall be destroyed.

7. The number of cases of corporal punishment, by whomsoever inflicted, shall be reported by the respective principals monthly in writing to the superintendent and to the assistant superintendent in charge.

Sect. 212.1 Any pupil may be detained (with the approval of the principal), at the close of the session in day elementary or junior high schools for a period not exceeding one hour to make up imperfect lessons, but such detention shall be only on account of the pupil's fault or neglect.

2. A pupil may be barred from participation in extracurricular activities if, in the opinion of the headmaster or principal, he has failed to maintain a satisfactory standard of conduct or scholarship.

3. Pupils in Latin and day high schools whose scholarship or conduct is unsatisfactory may be required to return to school after the close of the regular session for a period not exceeding two hours daily.

Sect. 213.1 A head master or principal, in the case of a pupil under sixteen years of age who is a chronic school offender, may transfer, with the approval of the superintendent, such pupil to the M. Gertrude Godvin School for continued or flagrant violations of ordinary school discipline and good behavior.

Sect. 214.1 A pupil who shall in any manner wilfully deface or otherwise injure any portion of a school estate; or write any profane or indecent language or make any obscene characters on school premises; or who shall distribute or possess any obscene pictures or any obscene material, shall be liable to suspension, expulsion or other punishment according to the nature of the offense.

2. A pupil who defaces, loses, or destroys any book, apparatus, or other property belonging to the City shall be required to replace the same or make good the cost of such replacement.

Section 215

215.1 Any student, after the chronological age of sixteen years, who fails four or more major subjects for three successive bi-monthly marking periods, and whose conduct is unsatisfactory in the opinion of the head master or principal, may be suspended, except in those cases where the failure is due to excused and legitimate absence from school or where there exist extenuating circumstances. If the pupil so suspended is not reinstated within five school days from the date of his original suspension, then the matter shall be referred in writing by the head master or principal to the assistant superintendent for the district in which the school is located. Upon request of the pupil so suspended or his parent or guardian, said assistant superintendent shall hold a hearing in the matter and render a decision within ten school days from the date of the original suspension. The head master or principal or the pupil so suspended or his parent or guardian may request that the superintendent review the decision of the assistant superintendent, and, if such a request is made, the superintendent may, if he so elects, grant a hearing in the matter. If such case is not settled by the superintendent within five additional school days, the head master or principal or the pupil or his parent or guardian may request that the school committee review the matter and the school committee may hold a hearing if it so elects. In the event of appeal by the head master or principal to the superintendent or the school committee and pending decision in such matter by the superintendent or the school committee, the pupil shall be temporarily reinstated.

215.2 A head master or principal may suspend a school offender who is over sixteen years of age for continued flagrant violations or ordinary school discipline and good behavior. During the period of suspension, the head master or principal may refuse, after conference with the parents, to reinstated within five school days from the date of his original suspension, then the matter shall be referred in writing by the head master or principal to the assistant superintendent for the district in which the school is located. Upon request of the pupil so suspended or his parent or guardian, said assistant superintendent shall hold a hearing in the matter and render a decision within ten school days from the date of the original suspension. The head master or principal or the pupil so suspended or his parent or guardian may request that the superintendent review the decision of the assistant superintendent and, if such a request is made, the superintendent may, if he so elects, grant a hearing in the matter. If such case is not settled by the superintendent within five additional school days, the head master or principal or the pupil or his parent or guardian may request that the school committee review the matter and the school committee may hold a hearing if it so elects. In the event of appeal by the head master or principal to the superintendent or the school committee and pending decision in such matter by the superintendent or the school committee, the pupil shall be temporarily reinstated.

215.3 A head master or principal may suspend a school offender who is under sixteen years of age for violent or pointed opposition to authority or for continued or flagrant violations of school discipline and good behavior. In such cases the principal shall forthwith request the attendance of the parent or guardian of such suspended pupil at his office for the purpose of consultation and adjustment. If the pupil so suspended is not reinstated within three school days from the date of his original suspension, then the matter shall be referred in writing by head master or principal to the assistant superintendent for the district in which the school is located. Upon request of the pupil so suspended or his parent or guardian, said assistant superintendent shall hold a hearing in the matter and render a decision within six school days from the date of the original suspension. The head master or principal or the pupil so suspended or his parent or guardian may request that the superintendent review the decision of the assistant superintendent and, if such a request is made, the superintendent may, if he so elects, grant a hearing in the matter. If such case is not settled by the superintendent within five additional school days, the head master or principal or the pupil or his parent or guardian may request that the school committee review the matter and the school committee may hold a hearing if it so elects. In the event of appeal by the head master or principal to the superintendent or the school committee and pending decision in such matter by the superintendent or the school committee, the pupil shall be temporarily reinstated.

215.4 No student over sixteen years of age may be transferred to another school or suspended for more than ten school days for disciplinary reasons except in accordance with sections 215.1 or 215.2. No student under sixteen years of age may be transferred to another school or suspended for more than six school days for disciplinary reasons except in accordance with section 215.3.

Ch. III. Duties of the Superintendent

60.1 He may review all cases of suspension or discipline of pupils which are referred to him under section 215.

EXHIBIT B

PROPOSED RULES PERTAINING TO GRIEVANCES AGAINST TEACHERS

1. Statement of Purpose:

These rules seek to provide a mechanism for the resolution of complaints filed against persons who are employed as teachers by the Boston School Committee. The purposes of these rules are to insure fair procedures for teachers who are complained against, to insure that a complaining person is able to present his claim knowing that it will be heard and determined speedily and impartially, and to involve teachers, parents, and administrators in matters which vitally concern the educational process in Boston.

2. Definitions:

A. Major grievance: A complaint which, if proved, would constitute a violation of the Rules of the Boston School Committee or grounds for the suspension of dismissal of a teacher under Mass. Gen. Laws Ch. 71 SS42, 42D.

B. Minor grievance: Any complaint against a teacher in the Boston School System which does not constitute a major grievance.

C. Complainant: The parent or guardian of any person who is a student in the Boston School System.

D. Grievance Board: A board, composed for each school within the Boston School System, consisting of the following members:

a. The District Superintendent who is responsible for the district in which the school is located. The District Superintent shall act as chairman of the Board;

b. One teacher selected annually by the teachers of each school within the Boston School System;

c. One parent selected annually by the Home and School Association or other organization which generally represents parents of students within the school.

3. A complainant may present a major or minor grievance to the headmaster or principal of the school to which the teacher is assigned. The grievance may be presented orally or in writing, but in any case it shall be presented within ten days of the date when the grievance occurred. For good cause the principal or headmaster may accept a grievance presented within a reasonable time after the ten day period has expired. If the grievance is presented orally, the principal or headmaster shall immediately reduce the grievance to writing and shall confirm that the grievance is properly stated by obtaining the signature of the complainant. A copy of the written grievance shall then be delivered to the complainant.

4. Within two school days after the grievance is reduced to writing the headmaster or principal shall deliver a copy of the grievance to the teacher who has been complained against. The headmaster or principal shall not disclose the contents of the grievance to any person outside the school administration without the consent of the teacher.

5. Within three school days after delivery of a copy of the grievance to the teacher, the principal or headmaster shall meet with the complainant and the teacher and attempt to adjust the grievance. The teacher and the complainant shall have the right to appear at the meeting with counsel and shall have the right to call and examine any witness who appears at the meeting.

6. If the grievance is not adjusted to the satisfaction of any party to the proceeding, the matter shall be referred by the principal or headmaster to the Assistant Superintendent for the District within two school days after the meeting.

7. If the matter involves a major grievance, the Assistant Superintendent shall immediately notify the other two members of the grievance board for the school involved and shall schedule a hearing within ten school days after the matter was referred to him.

8. The hearing before the grievance board shall be conducted as follows:

   A. Reasonable notice of the hearing shall be sent to all parties by the Assistant Superintendent and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the facts and issues involved to afford them reasonable opportunity to present evidence and argument.

   B. All parties shall have the right to call and examine witnesses, to introduce exhibits, to question witnesses who testify and to submit rebuttal evidence.

   C. The grievance board is not required to observe the rules of evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

   D. All parties to the proceeding shall have the right to be represented by counsel.

   E. Any party shall, of his own expense, have the right to record or have transcribed the proceeding before the grievance board.

   F. The hearing shall be closed to the public unless the teacher who is complained against elects to make it a public hearing.

   G. The decision of the grievance board shall be rendered within five school days after the termination of the hearing, shall be based soley upon the evidence presented at the hearing, shall be in writing, and shall include a statement of the facts and a recommendation for disposition. Any member of the grievance board may write his own decision either concurring or dissenting from the decision of the majority.

9. If the grievance board recommends that the teacher be suspended, transferred, or dismissed from the System, the matter shall be referred to the Superintendent of Schools who shall take such action as he deems appropriate after giving due weight and consideration to the decision of the grievance board.

10. Any party to the proceeding before the grievance board may within five school days after receipt of notice of the decision, request the Superintendent of Schools to review the decision of the board and the Superintendent may, if he so elects, grant a hearing.

11. Any party to the proceeding may request the School Committee to review the decision of the Superintendent and the school committee may hold a hearing if it so elects.

12. If the grievance board recommends disciplining a teacher in such a way that does not involve suspension, transfer, or dismissal, the Assistant Superintendent shall, unless the recommendation is reversed by the Superintendent or School Committee, carry out the recommendation within a reasonable period of time.

13. If the matter involves a minor grievance, the Assistant Superintendent shall meet with all parties within five school days after the matter was referred to him. All parties shall have the right to appear at the meeting with counsel and shall have the right to call and examine any witness who appears at the meeting. The Assistant Superintendent shall use his good offices to adjust the alleged grievance to the satisfaction of all parties.

DON B. KATES, JR.
BRIAN PADDOCK
DIANE V. DELEVETT
PETER D. COPPELMAN
Attorneys at Law
22 Martin Street
Gilroy, California 95020
Telephone: (408) 842-8271

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FERNANDO HERNANDEZ, et al., Plaintiffs, vs. O.E. NICHOLS, et al., Defendants.	NO. C-70-800-RFD MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER

PRELIMINARY STATEMENT

Plaintiff FERNANDO HERNANDEZ is a thirteen year old grammar school student standing five feet 1-1/2 inches and weighing 103 pounds. Defendant O.E. NICHOLS, the principal of Pacheco Elementary School in which FERNANDO is a student, is a man of mature years standing 5' 11" and weighing 180 pounds. On April 2, 1970 defendant NICHOLS, apparently in the course of punishing FERNANDO, beat him about the head and face with his fists kicked him in the rear and violently threw him to the ground where he was again kicked. FERNANDO was never informed of the infraction of which he was accused, much less given the opportunity to refute the accusation. This incident is but the latest, and not the most serious, of a series of beatings which defendant NICHOLS has inflicted upon grammar school students. Such incidents include at least two occasions on which children were knocked unconscious. Although these assaults were illegal under California law, and under their own regulations, defendant members of the Board of Education have refused all pleas that NICHOLS be disciplined or directed to discontinue such illegal acts.

In addition to damages, plaintiffs seek temporary and permanent injunctive relief forbidding the following:

(1) Kicking of children or beating them about the head or face or any other part of the body except the buttocks, or any beating which is of excessive severity or which violates defendant's own regulations on the subject;

(2) The infliction of any beating without prior notification to the child and the parents of the reasons therefor and an opportunity to refute the evidence against him and to confront his accusers;

(3) The infliction of any beating casually or in the heat of anger, or without the concurrence of two adults other than the school employee who accuses the child;

(4) The infliction of any beating by the school employee who accuses the child:

(5) Failure to provide an explicit and exclusive list of infractions for which beatings will be inflicted along with a schedule of maximum punishments.

ARGUMENT

I. BEATINGS LIKE THOSE INFLICTED UNPON FERNANDO ARE REMEDIABLE UNDER THE FEDERAL CIVIL RIGHTS ACTS.

Whether under the rubric of cruel and unusual punishment, invasion of a right to personal security or general due process, it is clear that unjustifiable physical assault of citizens by public officials is unconstitutional and is remediable under the Civil Rights Acts. York v. Story, 324 F.2d 450, 456, n. 12 (9 Circ. 1964), Allison v. California Adult Authority, 419 F.2d 822, 823 (9 Cir. 1969), Jackson v. Bishop, 404 F.2d 571 (8 Cir. 1969) and cases there cited. It is equally clear that administrative officials who countenance such activity by knowingly refusing to take steps to protect the victims thereof are subject at least to injunctive relief. See e.g. Schnell v. City of Chicago, 407 F.2d 1084 (7 Cir. 1969) ("Under section 1983, equitable relief is appropriate in a situation where governmental officials have notice of the unconstitutional conduct of their subordinates and fail to prevent a recurrence of such misconduct."), Lankford v. Gelston, 364 F.2d 197 (4 Cir. 1966), Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1970). See also Fernelius v. Pierre, 22 Cal. 2d 226, 138 P.2d 12 (1943).

In addition to its specific guarantees, the due process clause of the Fourteenth Amendment generally forbids public officials to act in a manner which "shcoks the conscience." Rochin v. State of California, 342 U.S. 165, 169-170 (1953). Surely the conscience is shocked by the beating of a child in the manner described in plaintiffs verified complaint, particularly when it is done in the heat of anger, without notice of the accusations against him or opportunity for the child to refute them. (Nor is the shock value of the situation reduced by the fact that defendants have never denominated the offenses for which corporal punishment will be imposed or set out a schedule of maximum punishments.)

In discussing this matter, it is worthy of note that corporal punishment in state prisons is outlawed per se by every state except Mississippi and Arkansas and has recently been judicially invalidated as a cruel and unusual punishment in the latter. Jackson v. Bishop, 404 F.2d 571 (8 Cir. 1969). It is incongruous, to say the least, that grammar school children should be subjected to treatment considered too harsh, or susceptible to administrative abuse for hardened criminals. Plaintiffs do not in this action challenge the constitutionality of corporal punishment for grammar school students per se. 1] Of course it might meaningfully be suggested that corporal punishment of children is expected to be so much less severe than that applied to prisoners as to be qualitatively different. Many parents employ moderate corporal punishment even without procedural amenities and are not considered to have violated societal norms thereby. But the position of a parent, whose chastisement of the child will predictably be restrained by love, is very different from a school official, particularly one of the character of defendant NICHOLS. After all, even a parent would not be privileged to kick, and beat about the head, a child of grammar school age.

II. DEFENDANT NICHOL'S CONDUCT WAS ILLEGAL UNDER CALIFORNIA LAW AND UNDER THE REGULATIONS PROMULGATED BY THE NORTH COUNTY DISTRICT.

California Education Code S10854 authorizes teachers to impose corporal punishment in accordance with regulations promulgated by their local school boards. The regulations of the School District, though meagre, do require that all blows be formally administered with a paddle to the child's posterior. They further require the presence of at least one adult witness. (Exhibit D).

The authorization of Education Code S10854 is limited by the provisions of Penal Code S273a (prohibiting infliction of "unjustifiable physical pain" upon a child) as authoritatively construed in People v. Curtiss, 116 Cal.App. Supp. 771, 300 Pac. 801 (1931). The court therein upheld the conviction of a grammar school principal under S273a on the alternative grounds of unjustificably paddling a child and/or using excessive force in such paddling.

1] This is not, however, to be construed as an admission by plaintiffs or their counsel of the constitutionality of the practice. Rather, it is plaintiff's

The court first considered and rejected a line of older cases holding that a teacher has absolute discretion as to whether or not a pupil should be punished and as to the extent of the punishment. On the contrary, Penal Code S273a authorizes the trier of fact to determine whether the punishment was "unjustifiable," *i.e.* whether: (a) any punishment at all was justified; (b) corporal punishment was justified; (c) if corporal punishment was justified, the amount inflicted was nevertheless excessive:

> "And even if it be conceded that there is no direct testimony that punishment (irrespective of degree) was unmerited, under the circumstances, we take it that the trial judge [who sat as finder of fact] was not bound to accept the opinion of the appellant [defendant] to the effect that it was merited. He could determine the question from a consideration of the circumstances under which the punishment was inflicted, and reach the conclusion--as stated by him at the close of the case--that its infliction for the alleged injury to another boy was without cause, because the defendant made no attempt 'to gain any facts in relation to the matter; she preferred to rely upon the unsupported statement made by the mother [of the other child] who was, no doubt, more or less agitated by reason of the alleged injury inflicted upon her boy.'" (300 Pac at 807).

As to the issue of excessiveness, the trial court could properly rely upon evidence of bruises on the child's body and the testimony of the child and his brother, even though that testimony was contradicted by that of teachers who served

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personal view, as layman, that the schools ought to have power to inflict moderate corporal punishment under adequate safeguards against injury and standards of procedural fairness. The scope of this lawsuit is thus circumscribed by plaintiffs' desire for limited relief, rather than by the perameters of constitutional protection.

under the defendant's direct supervision and control. 300 Pac at 805-806.

The Curtiss case appears to be the only construction of Penal Code S273a with regard to corporal punishment inflicted by a teacher upon a student, or in relation to Educ. C. S10854.

In subsequentally reenacting S273a in identical form (except to add imprisonment to the previous provision for a fine in case of violation), the California legislature must be deemed to have accepted the construction placed upon the statute by Curtiss. See In Be Halcomb, 21 Cal.2d 126, 130 P2d. 384, 386 (1942) ("the Legislature is presumed to have known of these decisions and to have had them in mind when it enacted [a new statute] in practically the exact language of [its predecessor].")

The Curtiss decision (rendered on facts not materially different from those involved in the present case) is relevant in two respects. First, it is dispositive that defendants' conduct is unlawful as a matter of state law and therefore subject to injunction within the ancillary jurisdiction of this court. 2] But Curtiss, and Penal Code S273a, are also of vital importance to plaintiffs' federal civil rights claims. In general, states are free to impose punishments or delegate the imposition of punishments, as they see fit so long as: (a) procedural fairness obtains, (b) punishments are not cruel and unusual; (c) the punitive scheme is rationally related to some legitimate state purpose. The operation of the schools is a matter entrusted to state and local administrative officials, and one with shich the federal courts are loath to interfere. 3] But, in view of the illegality of defendant's acts under state law, the foregoing principles are inapplicable to this situation--or, apply with reverse English. It is not this court, but rather defendants, who are interfering with the lawful administration of the schools. Plaintiffs ask no more than that this Court enforce the dictates of state law against public officials who have flouted them.

Nor can it be suggested that defendants' conduct is anything other than constitutionally arbitrarary, irrational and unreasonable for it is patent that violation of state law cannot be justified as rationally related to any legitimate state objective. Finally, where state legislation parallels basic requirements of federal constitutional guarantees, violation of such state requirements is ipso facto constitutionally prohibited. Valle v. Stengel, 176 F.2d. 697 (3 Cir. 1947).

III. TO AVOID VIOLATION OF DUE PROCESS AND THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS, CORPORAL PUNISHMENT MUST BE ATTENDED BY CERTAIN BASIC MINIMAL PROCEDURAL SAFEGUARDS.

Plaintiffs are not familiar with any federal civil rights case, or indeed any case, which has considered the constitutionality of corporal punishment of school children. Two recent district court opinions do consider the requisites of corporal punishment of state prisoners for infractions of prison rules. 4] Talley v. Stephens, 247 F.Supp 683 (E.D. Ark. 1965), Jackson v. Bishop, 268 F.Supp. 804 (E.D. Ark. 1967), rev'd. on other grounds 404 F.2d. 571.

The prison regulations and practices as they existed at the time of the Talley case bore a remarkable resemblance to those employed by defendants in the present case. As the court said at pp. 687-688 of 247 F. Supp:

> "...the [State Penitentiary] board adopted a brief resolution authorizing the corporal punishment whenever in the judgment of the prison superintendent it apperas that such punishment is necessary to maintain prison discipline or to enforce respect for Penitentiary policies. The resolution did not prescribe

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2] See discussion infra. at p. 10.

3] On the other hand, the federal courts are imperatively required to intervene when school administration imperils the exercise of federal rights. "However wide the discretion of School Boards, it cannot be exercised so as to arbitarily deprive persons of their constitutional rights." Johnson v. Branch, 364 F.2d 177, 180 (4 Cir. 1966). See also Jackson v. Bishop, 404 F.2d 571, 577 (8 Cir. 1968).

4] As previously indicated, on appeal from the second of these district court decisions the Eighth Circuit declared corporal punishment unconstitutional per se, The lower court decisions assumed the constitutionality of corporal punishment, but imposed certain minimum requirements of procedural fairness and standards of physical safety. Of course the imposition of complete bar to corporal punishment in one area cannot justify ignoring any constitutional safeguards at all in another.

the form of such punishment, or the extent to which it may be employed. Its administration in practice has been described.

> "There are no written rules or regulations prescribing what conduct or misconduct will bring on a whipping or prescribing how many blows will be inflicted for a given act of misconduct. The punishment is administered summarily, and whether an inmate is to be whipped and how much he is to be whipped are matters resting within the sole discretion of the prison employee administering the punishment, subject to the present informal requirement of respondent that the blows administered for a single offense shall not exceed ten."

In enjoining further corporal punishment until and unless new, more explicit regulations were issued by the Penitentiary Board, the Court outlined basic procedural safeguards identical to those which plaintiffs deem appropriate here:

> "But, the Court's unwillingness to say that the Constitution forbids the imposition of any and all corporal punishment on convicts presupposes that its infliction is surrounded by appropriate safeguards. It must not be excessive; it must be inflicted as dispassionately as possible and by responsible people; and it must be applied in reference to recognizable standards whereby a convict may know what conduct on his part will cause him to be whipped and how much punishment given conduct may produce ... It is not the function of the Court to undertake to prescribe appropriate safeguards; that is the function of the Board or of respondent subject to the Board's approval. For the guidance of those in charge of the Penitentiary the Court will say, in a general way, that it has particular trouble with the fact that there is no established schedule of punishments, that punishments are inflicted

> summarily and by Assistant Wardens who may or may not be men of judgment and temperate nature, and that Talley as an individual has been subjected to physical beatings at the hands of Pike. The Court is also troubled by the fact that the question of whether a convict has produced "sufficient work" during a particular period is left to the subjective judgment of the Assistant Warden, who may, at times, act uncritically upon the recommendation or report of the line rider [prisoner supervising work]." (247 F. Supp. at 689-90; emphasis added)

When the case again came before the district court two years later, the judges found it necessary to clarify and adumbrate the standards developed in the previous opinion. As was said at 268F. Supp. 815-816:

> "First, more than one person's judgment should be required for a decision to administer corporal punishment. This is implicit in the existing rules which require such a decision to be made by a board of inquiry. In this procedure, the accuser should not be counted among those who sit in judgment.
>
> "Secondly, that circumvention of the rules and regulations by an official in time of anger is intolerable. Certainly a prisoner charged with a rule violation is entitled to and should be provided with an objectively reasoned, dispassionate decision as to whether or not he should be punished.
>
> "Third, that summary acceptance of one inmate's report on another without further investigation in determining whether punishment should be administered voids the effectiveness of any rules and regulations.
>
> "And, finally, it is suggested that the Superintendent or an Assistant Superintendent of the Prison participate in or review any decision to

inflict corporal punishment."

IV. PLAINTIFFS ARE ENTITLED TO RELIEF ON THEIR STATE LAW CLAIMS.

People v. Curtiss, supra. is dispositive of the rectitude of plaintiffs substantive claims. Conduct like that engaged in by defendant NICHOLS gives rise to a claim for civil assault. Serres v. South Santa Anna School District, 10 C.A.2d 152, 51 P.2d 893 (1935).

Furthermore, Pen. C S273a, as a criminal statute, establishes the public policy of the State, and, as such, is enforceable by equitable decree. Petermann v. International Brotherhood of Teamsters, 174 C.A.2d 184, 344 P.2d 25 (1959), Glenn v. Clearman's Golden Cock, Inc. 192 C.A2d 793, 13 CRptr. 793 (1961), Williams v. International Brotherhood of Machinists 27 C.2d 586, 165 P.2d 903, 905 (1946) ("...where persons are subjected to certain conduct by others which is deemed unfair and contrary to public policy, the courts have full power to afford the necessary protection."). See also Sapiro v. Frisbie, 93 Cal.App.299, 270 Pac. 280 (1928).

DATED: April 16, 1970

Respecfully submitted,

By________________________________
DON B. KATES, JR.
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FERNANDO HERNANDEZ, MAXINE HERNANDEZ, LUPE HERNANDEZ, ROSEMARY HERNANDEZ, YOLANDA HERNANDEZ, AUGUSTINE HERNANDEZ and DANIEL HERNANDEZ, through their parents and general guardians MAX and GUADALUPE HERNANDEZ; GENARD GUTIERREZ, ORALIA GUTIERREZ and ALVIA GUTIERREZ, through their parents and general guardians JOSE C. and SEVERA GUTIERREZ; RONNIE ACOSTA, CONRADO ACOSTA, ARMANDO ACOSTA, JOE LOUIS ACOSTA and MIKE ACOSTA, JR. through their parents and general guardians, MIKE and ADELIA ACOSTA; all for themselves individually and for all other parents and children similarly situatuated.

Plaintiffs

vs.

ORVILLE E. NICHOLS, individually and as Superintendent of the NORTH COUNTY JOINT UNION SCHOOL DISTRICT; THE NORTH COUNTY JOINT UNION SCHOOL DISTRICT, a public entity, JOE CONCONI, WILLIAM HAWKINS, FRED SHARP, LILLY SHIMONISHI, and RUSSELL SMITH, all individually and as members of the Board of Trustee of the NORTH COUNTY JOINT UNION SCHOOL DISTRICT; and PAUL RUETER, individually and as an employee of the NORTH COUNTY JOINT UNION SCHOOL DISTRICT,

Defendants.

NO. C-70-800-RFP

ORDER TO SHOW CAUSE RE TEMPORARY RESTRAINING ORDER AND TEMPORARY RESTRAINING ORDER

On reading the verified complaint of plaintiffs on file in this action, the affidavits attached thereto and memorandum of points and authorities submitted therewith, and it appearing to the satisfaction of the Court that this is a proper case for granting an Order to Show Cause and a Temporary Restraining Order. A Temporary Restraining Order as set forth below having been agreed to:

NOW THEREFORE it is hereby ordered that the above-named defendants and each of them appear before this Court at 190 Market Street, San Jose, California on April 24th, 1970 at the hour of 10:30 a.m. then and there to show cause, if any they have, why they and each of them and their agents, employees, alternates successors or anyone connected therewith should not be enjoined and restrained during the pendency of this action from imposing corporal punishment on child plaintiffs or any child similarly situated: (a) because of his racial or ethnic background; (b) in a cruel or excessive manner or disproportionately to the offense; (c) by blows with the hands or fists or feet to any portion of a child's anatomy except his posterior, such blows to be delivered only by hand or paddle and not to exceed five in number; (d) in the heat of anger or informally or casually; (e) by the person who brings the charge against the child; (f) without the prior concurrence of at least two adult school employees other than the person who brings the charges against the child; (g) in any manner not specified in the School District regulations on this subject: (h) except as provided in a list of offenses for which corporal punishment will be imposed which shall also specify the maximum amounts of such punishments; (i) without prior written notice to the parent and and child of the charges and possible punishments and the opportunity for the same to be heard and for the child to confront his accusers.

IT IS FURTHER ORDERED that pending the hearing and termination of said Order to Show Cause the defandants and each of them and their agents employees, alternates and successors, and anyone connected therewith, shall be, and they are hereby, restrained and enjoined from imposing corporal punishment on the named child plaintiffs Provided nothing herein shall prevent the defendants from taking other appropriate disciplinary action.

DATED: April 16, 1970, at 10:52 a.m.

/s/ ROBERT F. PECKHAM
UNITED STATES DISTRICT JUDGE.

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CORPORAL PUNISHMENT IN THE PUBLIC SCHOOLS

Murphy v. Kerrigan

After their children had been corporally punished in a Boston public school,[1] several parents brought suit in federal court against members of the school committee, the school principal, and the teachers who had inflicted the punishment.[2] Plaintiffs challenged the use of corporal punishment as a disciplinary measure in the public schools. A consent decree was entered by which the school system agreed to ban corporal punishment so long as the present school committee is in office. The issues involved were not litigated.

Because no previous cases had been brought challenging the constitutionality of corporal punishment,[3] this suit performed a trailblazing function.[4] Plaintiffs argued that use of physical force constituted cruel and unusual punishment in violation of the eighth amendment and a deprivation of liberty without due process of law in violation of the fourteenth amendment. They also contended that the absence of sufficient procedural safeguards before infliction of corporal punishment amounted to a denial of fourteenth amendment protections.[5]

The common law does not protect students against all corporal punishment, the administration of which is governed in many jurisdictions by state statute or school board regulation. New Jersey is the only state to prohibit it by law.[6] Statutes prohibiting cruelty to children and, more often, the common law of assault and battery provide some protection against abuses. Courts have held that corporal punishment of children must be administered without malice;[7] be reasonable in light of the age, sex, size, and physical strength of the child;[8] be proportional to the gravity of the offense;[9] and be performed to enforce reasonable rules.[10] In holdings governing corporal punishment, some courts have presumed the reasonableness of the teacher's actions.[11] Permissible "unabusive" beatings with a rattan, strap, paddle, or hand, however, as well as beatings impermissible under common law, produce degradation and psychological reactions that provide the rationale for declaring all such punishments violative of the eighth and fourteenth amendments.

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[1] For alleged misconduct, Jeannette Watts, a fourteen-year-old student at the Patrick F. Gavin School in Boston, was struck by her teacher on her cheek and fell as a result of the blow. Another teacher grabbed her by the hair, forced her to the floor, and slapped her in the face. For disciplinary reasons, a teacher took hold of a fourteen-year-old ninth grader, Margaret Populo, punched her in the face, and ripped a pierced earring off her ear. Thirteen-year-old James Watts received two blows on the palm of each hand with a bamboo rattan, causing sharp twinges, a welt, and broken blood vessels under the skin. Many other instances of corporal punishment were also charged.

[2] Murphy v. Kerrigan, Civil No. 69-1174-W (D. Mass., filed Nov. 6, 1969).

[3] Murphy v. Kerrigan, Civil No. 69-1174-W (D. Mass., filed Nov. 7, 1969) (Wyzanski, C.J.) (opinion on motion for temporary restraining order).

[4] Since then, another case has been brought posing similar constitutional arguments against the use of corporal punishment in public schools. Ware v. Estes, Civil No. 3-4147-V (N.D. Tex., filed Sept. 4, 1970).

[5] Counsel for Murphy also argued that the standards regulating the administration of corporal punishment were arbitrary, vague, and overbroad, in violation of students' fourteenth amendment rights. In addition, they challenged use of corporal punishment on the grounds that it abridged some ill-defined children's privileges, as well as immunities granted by the ninth and fourteenth amendments.

[6] M. Remmlein & M. Ware, SCHOOL LAW 303 (1970); *see* N.J. Stat. Ann. § 18A:6-1 (1968).

Corporal punishment in the public schools is ineffective and harmful. If mildly and irregularly applied, it is useless in controlling behavior. In order to prevent the recurrence of unwanted behavior, corporal punishment must either be applied continually,[12] or its exemplary application must have a "terrifying and traumatic" effect.[13] Not surprisingly, the National Education Association has concluded that corporal punishment is ineffective in reducing behavioral problems.[14] Furthermore, an English study found that a deterioration of behavior and an increase in delinquency accompany increased use of corporal punishment.[15]

Corporal punishment has further deleterious effects on children. Insofar as it relies on fear, it disrupts the learning process by repressing the natural tendency of children to explore.[16] This fear may be channeled into aggression against the teacher, against the school, or against society. At the extreme, juvenile delinquency may result.[17] Finally, and perhaps most seriously, the use of corporal punishment may inhibit the development of self-criticism and self-direction in the child. Corporal punishment may drive students to concentrate their energies on conflict with the teacher instead of encouraging them to adjust to their classroom situation.[18]

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[7] State v. Pendergrass, 2 Devereux and Battle's Rep. 365 (N. Car. 1837).

[8] Suits v. Glover, 260 Ala. 449, 71 So. 2d 49, 50 (1954).

[9] *E.g.*, Tinkham v. Kole, 252 Iowa 1303, 110 N.W.2d 258 (1961); Howeye v. St. Helena Parish School Bd., 223 La. 966, 67 So. 2d 553 (1953); Lander v. Seaver, 32 Vt. 114 (1859); Commonwealth v. Randall, 70 Mass. (4 Gray) 36 (1855).

[10] M. Nolte & J. Linn, SCHOOL LAW FOR TEACHERS 219 (1963).

[11] Drake v. Thomas, 310 Ill. App. 57, 33 N.E.2d 889 (1941); Lander v. Seaver, 32 Vt. 114, 124 (1859); *see* Note, *Right of a Teacher to Administer Corporal Punishment to a Student*, 5 WASHBURN L.J. 75, 78-79 (1965).

[12] Estes & Skinner, *quoted in* Nash, *Corporal Punishment in an Age of Violence*, 13 EDUCATIONAL THEORY 296, 302 (1963).

[13] Symonds, *quoted in id.* at 302.

[14] Boston Legal Assistance Project, NEGATIVE ASPECTS OF CORPORAL PUNISHMENT 4 (1970).

[15] Nash, *supra* note 12, at 301.

[16] Silverman, *Discipline: Its Psychological and Educational Aspects*, 42 MENTAL HYGIENE 277 (1958).

[17] Kvaraceus, *quoted in* Nash, *supra* note 12, at 306.

While theoretically corporal punishment need not be brutal, there is no assurance that it will be inflicted moderately or responsibly. In the heat of anger, especially if provoked by personal abuse, some teachers are likely to exceed legal bounds. Moreover, if limited corporal punishment were permitted, controls would be unlikely to prevent the "really unmistakable kind of satisfaction which some teachers feel in applying the rattan."[19] A total ban of this punishment would provide far more effective control.[20]

Finally, corporal punishment undermines human dignity. Students are placed at the mercy of teachers who have the power to beat them without explanation or justification. In an institution which purports to inculcate the value of reason in human affairs and the worth of each individual in society, it is antithetical to educate by brutality and unreason.

Through the fourteenth amendment,[22] the eighth amendment prohibition against cruel and unusual punishment has been applied to the official conduct of public school teachers and administrators.[23] A teacher's resort to corporal punishment has been held to constitute "punishment" within the meaning of the amendment and is therefore subject to constitutional restraints.[24] The question is whether corporal punishment is cruel and unusual within the meaning of the eighth amendment.

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[18] Nash, *supra* note 12, at 304.

[19] J. Kozol, DEATH AT AN EARLY AGE 16-17 (1967).

[20] A rule forbidding all corporal punishment would probably receive more compliance than the common law principles because all parties involved are more likely to be aware of it and conscious of any violation. This would likely be reinforced by the added ease of convicting a violater, simply by holding the school official involved in contempt of a court order, where injunctive relief is obtained.

[21] Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968).

[22] *See* Robinson v. California, 370 U.S. 660 (1962); Jackson v. Bishop, 404 F.2d 571, 576 (8th Cir. 1968).

[23] *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958).

[24] In Trop v. Dulles, 356 U.S. 86, 94-100 (1958), the Supreme Court, in applying the eighth amendment to all punishments inflicted pursuant to "penal laws," set forth two tests to determine the meaning of penal. First, there must be the imposition of a "disability for the purpose of punishment." *Id.* at 96. Second, there must be the prescription of a "consequence that will befall one who fails to abide by regulatory provisions . . . . " *Id.* at 97.

Infliction of corporal punishment by public school personnel meets both tests.

The fact that punishment in public schools may be subject to constitutional restraints, while punishment in the home is not, rests on the legal and practical distinctions between the two situations. Because the mode of discipline practiced in the public schools is an expression of state policy and judgment, the law holds it to a stricter standard than parental punishment. Furthermore, the teacher's authority to administer corporal punishment stems from his *in loco parentis* relationship to the

Although the Supreme Court has not provided any precise definition of these words,[25] it has established certain guidelines to interpretation. It has held that underlying the amendment is "nothing less than the dignity of man."[26] The Court has also declared that the scope of the clause extends beyond the prohibition of those punishments regarded in 1791 as cruel and unusual, holding that the amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[27] The Court has approached eighth amendment challenges from two perspectives: first, whether the punishment is cruel and uncivilized, viewing only the punishment itself;[28] and second, whether the punishment is clearly excessive in comparison to those meted out elsewhere for similar offenses.[29]

In declaring disciplinary measures cruel and unusual, the Supreme Court has sought to express its concept of "civilized treatment."[30] While

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children. 79 C.J.S. *Schools and School Districts* § 493 (1952). Because it constitutes only a temporary delegation of parental powers with few of the responsibilities, and determines neither the teacher's privilege of punishment nor the extent of this privilege, the *in loco parentis* theory is insufficient grounds on which to base the authority to punish students physically. Taylor, *With Temperate Rod: Maintaining Academic Order in Secondary Schools*, 56 KY. L. REV. 617, 624 (1970). Aside from the legal considerations, the significance of corporal punishment differs according to the context in which it is administered. Normally the home provides a more supportive and secure atmosphere, which may temper the effects of corporal punishment, while the school is more institutional and impersonal.

[25] Trop v. Dulles, 356 U.S. 86, 99 (1958).

[26] *Id.* at 100.

[27] *Id.* at 102; *see* Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968); Note, *The Eighth Amendment and Our Evolving Standards of Decency: A Time for Re-evaluation*, 3 SUFFOLK U. L. REV. 616, 619 (1969); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 637 (1966).

[28] In Trop v. Dulles, 356 U.S. 86, 99, 101 (1958), the Supreme Court held that denationalization as a punishment for deserting the United States in time of war, is barred by the eighth amendment as cruel and unusual punishment. In Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968), then Judge Blackmun declared that whipping prisoners with a strap in Arkansas penitentiaries "offends contemporary concepts of human decency and precepts of civilization which we profess to possess." *See also* Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 847-48 (1961).

[29] Weems v. United States, 217 U.S. 349, 380-81 (1910); *see* Rudolph v. Alabama, 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting); Robinson v. California, 370 U.S. 660, 676 (1962) (Douglas, J., concurring); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 107 (1968).

In presenting their cases, students are likely to make an issue of gross and outrageous instances of coporal punishment. Courts would have been likely to strike these down on other grounds in the past. The difficulty is the leap from declaring a particular instance of coporal punishment to be cruel and unusual to holding all coporal punishment impermissible.

[30] Trop v. Dulles, 356 U.S. 86, 99 (1958).

it has tended to examine "historic usage of particular punishments, statutory authorization in other jurisdictions, and general public opinion,"[31] its inquiry has included "enlightened" as well as actual standards of decency.[32] If the context in which a punishment is administered renders it degrading[33] and subject to wanton—irregular and arbitrary–imposition,[34] then under an enlightened standard such punishment should be presumed cruel and unusual.[35]

The excessiveness principle[36] could also serve as a basis for decision. Many American courts have misinterpreted the meaning of the cruel and unusual clause to prohibit only "cruel" and "barbaric" punishments, while the English history of the clause reveals "a general policy against excessiveness in punishments."[37] Although courts refer to a principle relating the punishment to the offense charged, they appear reluctant to base conclusions on that ground.[38] One reason may be the difficulty in determining in a specific context the sort of treatment which should be considered excessive, since penalties and their objectives for any given offense vary greatly from state to state. The difficulties of determining excessiveness are reduced in corporal punishment cases, however, because of the evolution of society's attitudes. For example, society no longer authorizes the corporal punishment of sailors, apprentices, domestic servants, women, and, more recently, convicts.[39] The different treatment accorded students has been recognized and criticized for some time. The Supreme Court of Indiana declared as long ago as 1853:[40]

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[31] Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1780 (1970).

[32] Robinson v. California, 370 U.S. 660, 666 (1962) (The Court held drug addiction a disease not subject to punishment): "But, in light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." In other words, the Court was not saying that the general public did condemn punishment for drug addiction, but that if fully informed, it would condemn it. *See* Goldberg & Dershowitz, *supra* note 31, at 1783.

[33] Weems v. United States, 217 U.S. 346, 366 (1910); Goldberg & Dershowitz, *supra* note 31, at 1786.

[34] Francis v. Resweber, 329 U.S. 459, 463 (1947) ("The prohibition against wanton infliction of pain has come into our law from the Bill of Rights of 1688"); Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Orginal Meaning*, 57 CALIF. L. REV. 839, 858-60 (1969); Goldberg & Dershowitz, *supra* note 31, at 1789.

[35] Corporal punishment is not the only mode of punishment which may under certain conditions be cruel and uncivilized. A severe tongue lashing, for example, may have a similar psychological effect. Cruel as verbal abuse may be, however, it would be very difficult for courts to draw a line between permissible and impermissible language. Corporal punishment, on the other hand, constitutes an act easily recognizable by students, teachers, and courts.

[36] Weems v. United States, 217 U.S. 349 (1910), the first Supreme Court case to view the eighth amendment as a progressive and flexible doctrine, made use of a comparative standard to determine the proportionality of the punishment to the crime. *See* Turkington, *Unconstitutionally Excessive Punishments: An Examination of the Eighth Amendment and the* Weems *Principle*, 3 CRIM. L. BULL. 145, 147 (1967). Although the Court implied a rejection of the comparative criterion for excessiveness seven years later, Badder v. United States, 240 U.S. 391 (1916), three justices (Goldberg, Douglas and Brennan) have indicated more recently that the *Weems* principle is not extinct. Rudolph v. Alabama, 375 U.S. 889 (1963). *See* Note, *The Cruel and Unusual Punishment Clause and Substantive Criminal Law*, *supra* note 27, at 641.

[37] Granucci, *supra* note 34, at 843-844

> The public seem to cling to the despotism in the government of schools which has been discarded everywhere else . . . . The husband can no longer moderately chastise his wife; nor . . . the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy . . . should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained.

When society becomes concerned about a group and begins to recognize its basic rights, it no longer subjects the group to corporal punishment. During the past few years the judiciary has become deeply involved in the recognition of students' rights. School regulations and procedures are being scrutinized intensely.[41] In *Tinker v. Des Moines Independent Community School District*,[42] the Supreme Court stated: "[I]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students . . . are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect . . . .[43] The Court has recognized that its view of students' rights parallels the evolution which has taken place in educational philosophy. Traditionally seen as objects without the right to question the regulations that governed their lives or the curriculum they were taught, students are no longer to be viewed as "closed-circuit recipients"[44] in the educational process. While courts acknowledge the "comprehensive authority"[45] of states and schools to regulate and control school conduct, they recognize a student's need for "scrupulous protection"[46] of his constitutional rights. Thus the courts have protected students' rights to wear their hair as they choose,[47] to refuse to salute the flag if their consciences dictate,[48] and to express themselves freely about political events.[49] Courts should reflect the enhanced status of students in their consideration of the constitutionality of coporal punishment.

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[38] Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968); Holt v. Sarver, 309 F. Supp. 362, 380 (E.D. Ark. 1970); Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966); Turkington, *supra* note 36, at 156-160.

[39] Jackson v. Bishop, 404 F.2d 571, 575 (8th Cir. 1968) (The only state in which corporal punishment may still be used in prison is Mississippi).

[40] Cooper v. McJunkin, 4 Ind. 290, 291, 293 (1853).

[41] *See* Goldstein, *Reflections on Developing Trends in the Law of Students' Rights*, 118 U. PA. L. REV. 617 (1970).

[42] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1968); *see* Nahmod, *Beyond* Tinker: *The High School as an Educational Public Forum*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 278 (1970).

[43] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1968).

In applying the eighth amendment, comparisons should be drawn not only to punishments levied in other jurisdictions, but also to the severity of punishment necessary to achieve a given end.[50] In *Rudolph v. Alabama* three Supreme Court justices wished to focus on the justifications for and alternatives to a particular punishment to determine whether its aims could be achieved as effectively by a less severe method.[51] In the eighth amendment area, however, the existence of a less restrictive means is probably insufficient by itself to invalidate a punishment, since that amendment is directed at measures which represent a gross departure from enlightened community standards. Nevertheless, because of the importance of a person's physical integrity, once a less restrictive alternative is demonstrated, courts should narrowly confine the range of permissible punishments.

A court which decides that corporal punishment in the public schools does not violate the eighth amendment's protections may still declare it unconstitutional as a violation of the due process clause of the fourteenth amendment. If the Supreme Court were to apply a limited standard of review, as it does in cases involving state economic regulation, corporal punishment would probably be upheld as a plausible, non-arbitrary method of maintaining discipline and order in a classroom.[52] But when the Court has reviewed state actions that infringe upon rights protected by the first amendment or upon other fundamental interests, it has placed a more substantial burden of justification upon the state.[53]

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[44] *Id.*

[45] *Id.* at 507.

[46] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); *see* Breen v. Kahl, 296 F. Supp. 702, 708 (W.D. Wis. 1969).

[47] Breen v. Kahl, 296 F. Supp. 702, 708 (W.D. Wis. 1969); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); *contra*, Stevenson v. Board of Educ. of Wheeler County, Ga., 426 F.2d 1154 (5th Cir. 1970), *cert. denied*, 91 S. Ct. 355 (1970); Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 91 S. Ct. 55 (1970).

[48] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[49] Tinker v. Des Moines Independent Community School Dist. 393 U.S. 503 (1968).

[50] *Cf.* Weems v. United States, 217 U.S. 349, 370 (1910).

[51] 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting, joined by Douglas and Brennan, JJ); Robinson v. California, 370 U.S. 660, 677 (1962) (Douglas, J., concurring).

Physical integrity is such an interest. Although never confronting the question under the due process clause, the Court has suggested in recent cases challenging searches and seizures that the right of physical integrity is one of the underlying values of the fourth amendment.[54] Corporal punishment, although neither a search nor a seizure under the fourth amendment, does directly infringe upon this underlying value, which is to be protected against state action.

The Supreme Court's review of the blood-alcohol test in *Schmerber v. California*[55] and the stop-and-frisk in *Terry v. Ohio*[56] illustrates the importance attached to the notion of physical integrity. The searches in both cases were approved under the fourth amendment's standard of reasonableness.[57] But the Court considered them reasonable because they were thought minimal and necessary intrusions in aid of crime prevention and detection.

In *Schmerber*, the Supreme Court held that requiring a blood-alcohol test from an unconsenting driver suspected of driving while intoxicated was not an unreasonable search under the fourth amendment. The Court reached its decision, however, only after it concluded that the police were confronted with an emergency situation and that the test itself was effective and innocuous. The Court declared that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[58] Although there was probable cause to arrest the defendant, which would usually justify a warrantless search, the Court stated that a warrant should normally be obtained before the police "invade another's body."[59] The warrantless invasion here was reasonable because alcohol in the blood begins to decrease rapidly after a person stops drinking. The test itself was considered reasonable because it is "highly effective" and "commonplace", "the quantity of blood extracted is minimal," "for most people the procedure involves no risk, trauma, or pain", and the "blood was taken by a physician in a hospital environment according to accepted medical practice."[60] Although the Court did not foreclose the use of other reasonable procedures, it said that "[i]t bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society."[61] Thus even in the face of a strong state interest in protecting life and limb on the highways by convicting drunken drivers on the basis of scientific evidence, the Court seemed to be cautioning against anything greater than a minor, harmless intrusion upon an individual's physical integrity.

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[52] *See* Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[53] United States v. O'Brien, 391 U.S. 367 (1968) (free speech); Griswold v. Connecticut, 381 U.S. 479 (1965) (right of privacy).

[54] Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Schmerber v. California, 384 U.S. 757 (1966) (blood-alcohol test).

[55] 384 U.S. 757 (1966).

[56] 392 U.S. 1 (1968).

[57] U.S. Const. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . . "

[58] Schmerber v. California, 384 U.S. 757, 767 (1966).

[59] *Id.* at 770.

In *Terry*, a policeman stopped the defendant for investigation, frisked him, found a pistol, and arrested him for carrying a concealed weapon.[62] The Court stated that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humilitating experience."[63] It held the policeman's patting the petitioner's overcoat to be a reasonable search only because the officer had a reasonable belief that the petitioner was armed and that his safety and that of others nearby might be endangered.

Just as with the taking of blood and stop-and-frisk, a court should impose a greater burden than the mere rationality standard upon the state to justify the use of corporal punishment. Corporal punishment, like a search or seizure, infringes upon a value at the root of the fourth amendment–physical integrity. Insofar as the same values underlie the fourteenth amendment's due process clause, a court should test corporal punishment against a standard similar to that applied in cases involving search and seizure of the person. Extensive searches are permissible when a police officer arrests an individual with probable cause because he must protect himself and look for evidence which the suspect might destroy. Even in arrests, however, physical intrusion is limited by the requirements of the situation, especially when the intrusion is greater than a mere body search.[64] In non-arrest situations, physical intrusion is even more strictly limited.[65] Thus, in assessing corporal punishment, courts should require the states to demonstrate that there are no other effective means available which are less destructive of physical integrity. The burden of adducing evidence to uphold corporal punishment rests with the state. But to date, there is no empirical evidence to demonstrate that corporal punishment is necessary to maintain order in the classroom or to promote students' educational progress. If anything, the evidence suggests the contrary.[66]

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[60] *Id.* at 771.

[61] *Id.* at 772.

[62] Terry v. Ohio, 392 U.S. 1, 5-7 (1968).

[63] *Id.* at 24-25.

[64] Schmerber v. California, 384 U.S. 757 (1966).

[65] Terry v. Ohio, 392 U.S. 1 (1968).

A less restrictive means test may sensibly be applied to corporal punishment in public schools. Becasue a state many pursue retribution as one of the aims of its penal laws, all penalties that do not violate the eighth amendment may be valid. Therefore, if a state prisoner were to argue that a five-year sentence provided as much deterrence and rehabilitation as the ten-year sentence he actually received, a court would be justified in refusing to declare the longer punishment unconstitutional. While corporal punishment in the schools is penal, in the sense that it seeks to correct the offender's future conduct and to deter others from acting in a similar manner, unlike a state penal code, such punishment is not properly directed toward retribution. Moreover, where criminal penalties are augmented because of the retributive element, such procedural safeguards as indictment, counsel, and jury trial–wholly inapposite in the school context–exist to guarantee the appropriateness of the penalty.

If corporal punishment is to be allowed at all, it must be administered only within the constraints of appropriate safeguards.[67] Before taking certain disciplinary measures, public schools must provide students with an opportunity at least to hear and rebut charges before the proper authorities. Both colleges and public schools must accord students a hearing before suspending or dismissing them.[68] Likewise, students subjected to disciplinary transfer,[69] denied the right to participate in interscholastic athletics,[70] or forbidden from taking a college qualifying examination,[71] are entitled to hearings. Consideration of the procedural requisites of due process which should accompany disciplinary action necessitates an examination of the governmental function involved and the private interests affected.[72]

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[66] *See* p. 584-85.

[67] The very regulation permitting physical correction may violate the dictates of due process if it is overly broad and vague. Cramp v. Board of Pub. Instr., 368 U.S. 278, 287 (1961). Insofar as it fails to provide a clear standard and procedure to guide teachers in the use of corporal punishment, it may constitute a threat to innocent children who commit inconsequential breaches of classroom rules, as well as provide a restraint on gross misbehavior.

[68] Woods v. Wright, 334 F.2d 369 (5th Cir. 1964); Esteban v. Central Mo. State Coll., 277 F. Supp. 649 (W.D. Mo. 1967).

[69] Owens v. Devlin, Civil No. 69-118-G (D. Mass., 1969).

[70] Kelley v. Metropolitan County Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968).

[71] Goldwyn v. Allen, 54 Misc.2d 94, 281 N.Y.S. 2d 899 (1967).

[72] Cafeteria and Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1965).

As against a school's educational function, the interest of the student who is expelled or suspended is the impairment of his reputation, with serious economic and social consequences, especially when the action taken will be noted on his permanent record.[73] The interest of the student subjected to corporal punishment involves his physical integrity and human dignity. The interest in each case is equally fundamental. Procedural safeguards in both, therefore, should prevent unwarranted punishment and those excessively administered.

Because tempers often flare in the classroom, it is important that the accuser, judge, and executioner not be the same person.[74] The Supreme Court has recognized that the emotional involvement of the judge who declares a defendant in contempt disqualifies him from presiding when the contempt issue is tried.[75] Similarly, the school official who prescribes corporal punishment, if it is permitted at all, should not be the one who applies it. At a minimum, for any offense serious enough to warrant corporal punishment, a child should have the opportunity to disclaim or justify his conduct before a teacher, parent, and impartial school officer, and the determination of the punishment should result from collaboration of the adults present. Such a requirement should be maintained because it is a guarantee of fairness and rationality which should be imported to an area in which students can be treated harshly.[76]

The delay engendered by the imposition of procedural requirements between the misconduct and the punishment need not reduce the efficacy of the sanction, so long as the student fully comprehends the reason for his punishment. Even if the effectiveness were reduced, it might be the necessary cost of providing fair treatment. Schools would thereby demonstrate to their students that sound justifications should precede the use of physical force.

Once prevalent as a generally accepted means of controlling behavior, corporal punishment is officially sanctioned today only against children.[77] It is inconsistent with modern educational theory and methods, which have progressed from a strict authoritarian concept of education to one emphasizing communication and rapport between teacher and student. The reliance on force, abusive and brutal at times, is a counterproductive means of achieving order in the schools. With an understanding of the effects of corporal punishment and an appreciation for the recently recognized status of students, courts should find corporal punishment cruel and unusual and a denial of due process of law.

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[73] *Developments in the Law – Academic Freedom*, 81 HARV. L. REV. 11045, 1138 (1968).

[74] Mayberry v. Pennsylvania, 91 S. Ct. 499, 504-05 (1971).

[75] *Id.*

[76] Parents have an interest that students not be severely disciplined without, at a minimum, consultation.

[77] *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

–Peter S. Aron
–Martin L. Katz

D. Additional Corporal Punishment Cases.

During the past year and a half a number of other school corporal punishment cases have been filed. Most pose the same arguments as those put forth in Murphy, with varying degrees of emphasis on the constitutional issues. These cases include:

Hardy v. Autauga County Board of Education, No. 36304-N (M.D. Ala. filed Feb. 29, 1972) (TRO, Mar. 2, 1972): Attorney Howard Mendel, 112 Washington Building, Montgomery, Ala. 36104.

Ingraham v. Wright, No. 71-23 Civ-JE (S.D. Fla. filed Jan. 7, 1971): Attorney Al Feinberg, Greater Miami Legal Services, 395 N.W. First Street, Miami, Fla.

School Committee v. West Va. Board of Education, No. 71-29-F (N.D. W.Va. filed Oct., 1971): Attorney Ed Friend, 180 Chancery Rd., Morgantown, West Virginia.

Sims v. Board of Education of Independent School District No. 22, 329 F. Supp. 678 (D.N. Mex. 1971), on appeal (from dismissal of complaint) to the Tenth Circuit: Attorney Donald Juneau, P. O. Box 306, Window Rock, Ariz.

Ware v. Estes, 328 F. Supp. 657 (N.D. Tex. 1971) (lost on the merits), on appeal to the Fifth Circuit: Attorney Fred Time, Legal Arts Center, 600 Jackson Street, Dallas, Texas 75202.

The American Civil Liberties Union, which has declared the abolition of corporal punishment in public schools to be one of its top priorities, is attempting to coordinate the corporal punishment cases currently pending in order to conserve energy and resources. Anyone undertaking such a case should contact Joel Gora, ACLU, 156 Fifth Ave., New York, N.Y. 10010.

The most current work on the negative aspects of corporal punishment is a book, Violence Against Children, by Mr. David Gil (Harvard University Press, Cambridge, Mass. 1970). Mr. Gil bases his book, in part, on a nation-wide survey of reported incidents of violence against children during 1967 and 1968. Mr. Gil, a professor of social policy at Brandeis University, testified as an expert in Ware v. Estes.

PROBLEMS OF STUDENT DISCIPLINE AND CLASSROOM CONTROL

PROBLEMS OF STUDENT DISCIPLINE AND CLASSROOM CONTROL

Roy Lucas*

Prepared for Presentation at the Spring Conference
of the National Association of Teacher Attorneys
Tuesday, May 5, 9:30 AM

I. INTRODUCTION

A. Student Discipline and Student Rights

An overview of the kinds of student discipline problems occurring today in elementary and secondary schools, and the impact of these problems upon the teacher.

B. Sources of Information

A guide to information and case law on student discipline issues and student rights:

THE LAW OF PUBLIC EDUCATION, E. Reutter & R. Hamilton, 1970, The Foundation Press, Inc., Mineola, New York;

PUBLIC SCHOOL LAW, K. Alexander, Ray Corns, and W. McCann, 1969, West Publishing Co., St. Paul, Minnesota;

EDUCATION LAW, G. Johnson, 1959, Michigan State University Press, East Lansins, Michigan;

STUDENT PROTEST AND THE LAW, G. Holmes, 1969, Institute of Continuing Legal Education, Hutchins Hall, Ann Arborn, Michigan;

The Pupil's Day in Court: Review of 19__, yearly research report, published by the Research Division of the National Education Ass'n;

COLLEGE LAW BULLETIN, published monthly by the U. S. National Student Ass'n, 2115 "S" St., N. W., Washington, D. C. - Roy Lucas, Editor;

EDUCATION COURT DIGEST, published monthly, 1860 Broadway, New York, N. Y.;

NOLPE SCHOOL LAW REPORTS, published monthly, N. O. L. P. E., 825 Western Ave., Topeka, Kansas;

Goldstein, The Scope and Sources of School Board Authority: to Regulate Student Conduct: A Nonconstitutional Analysis, 117 U. Pa. L. Rev. 373-430 (1969);

Abbott, Due Process and Secondary School Dismissals, 20 W. Res. L. Rev. 378 (1969);

Brennan, Education and the Bill of Rights, 113 U. Pa. L. Rev. 219 (1964);

Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027 (1969);

C. Historical Concepts of Student Discipline; In loco parentis; Reasonable Rules; Relevant Punishments

D. Sources of Law

(1) In loco parentis - parental rights
(2) Contract
(3) Fiduciary
(4) Constitutional Law
(5) Statute or local board rules

E. Jurisdiction in Student Cases

II. PROCEDURAL RIGHTS OF STUDENTS

A. Right to Hearing Before Severe Disciplinary Action
No applicable decision by U. S. Supreme Court or U. S. Court of Appeals in High School or Elementary School Case

Vought v. Van Buren Public Schools,
306 F. Supp. 1388 (E. D. Mich. 1969);

Sullivan v. Houston Indep. School Dist.,
307 F. Supp. 1328 (S. D. Tex. 1969);

Knight v. Board of Education of the City of New York,
48 F. R. D. 108 (E. D. N. Y. 1969);

Geiger v. Milford School Dist.,
51 D. & C. 647 (Pa. County Ct., Pike Cty 1944);

Woods v. Wright,
334 F. 2d 369 (5th Cir. 1964);

Relevant higher education decisions include:

Dixon v. Alabama Bd. of Educ.,
294 F. 2d 150 (5th Cir.), cert. denied, 368 U. S. 930 (1961);

Wright v. Texas Southern Univ.,
392 F. 2d 728 (5th Cir. 1968);

Stricklin v. Regents of the Univ. of Wis.,
297 F. Supp. 416 (W. D. Wis. 1969), appeal dismissed as moot, 420 F. 2d 1257 (7th Cir. 1970);

Marzette v. McPhee,
294 F. Supp. 562 (W. D. Wis. 1968);

Compare Wheeler v. Montgomery,
397 U. S. ___, 38 U. S. L. W. 4230 (Mar. 23, 1970);

See generally Abbott, Due Process and Secondary School Dismissals, 20 W. Res. L. Rev. 378 (1969); Note, Procedural Rights of Public School Children in Suspension-Placement Proceedings, 41 Temp. L. Q. 349 (1968); Note, 14 Kans. L. Rev. 108 (1965).

B. Rights to Notice of Charges, Offense, Rule Violated, and Adverse Evidence

See cases cited immediately above.

See also Hopkins v. Ayres, ____ F. Supp. _____, No. WC 6974-S (N. D. Miss. Oct. 24, 1969);

Esteban v. Central Mo. State College, 277 F. Supp. 649 (W. D. Mo. 1967);

Cf. Kelley v. Metropolitan Bd. of Educ., 293 F. Supp. 485 (M. D. Tenn. 1968)

C. Right to Fair and Impartial Hearing

No decision on impartiality in high school disciplinary cases.

Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967);

Compare Pickering v. Board of Educ., 391 U. S. 563, 578 n. 2 (1968) (dictum);

But see Barker v. Hardway, 283 F. Supp. 228 (S. D. W. Va.), aff'd, 399 F. 2d 638 (4th Cir. 1968) (per curiam), cert. denied, 394 U. S. 905 (1969); and
Jones v. Tenn. Bd. of Educ., 407 F. 2d 834 (6th Cir. 1968), cert. granted, 396 U. S. 817 (1969), writ dismissed as improvidently granted, 397 U. S. ___ (1970);

See generally Comment, Prejudice and the Administrative Process, 59 Nw. U. L. Rev. 216 (1964)

D. Right to Representation by Retained Legal Counsel

Cf. Madera v. Board of Educ. of City of New York, 267 F. Supp. 356 (S. D. N. Y.), rev'd, 386 F. 2d 778 (2d Cir. 1967), cert. denied, 390 U. S. 1028 (1968) (counsel in guidance conference);

Goldwyn v. Allen
54 Misc. 2d 94, 281 N. Y. S. 2d 899 (Sup. Ct., Queens County 1967);

Cf. French v. Bashful,
303 F. Supp. 1333 (E. D. La. 1969);

Zanders v. Louisiana State Bd. of Educ.,
281 F. Supp. 747, 752 (E. D. La. 1968);

Esteban v. Central Mo. State College,
277 F. Supp. 649, 651 (W. D. Mo. 1967);

Contra, Barker v. Hardway, 283 F. Supp. 228 (W. D. W. Va. 1968);
Wasson v. Trowbridge, 382 F. 2d 807 (2d Cir. 1967)

E. Right to Confront and Question Accusers

Cf. Esteban, supra;

F. Privilege Against Self-Incrimination

Goldwyn v. Allen,
54 Misc. 2d 94, 281 N. Y. S. 2d 899
(Sup. Ct. Queens County 1967);

Furutani v. Ewigleben,
297 F. Supp. 1163 (N. D. Calif. 1969);

Compare Spevack v. Klein,
385 U. S. 511 (1967); Gardner v. Broderick,
392 U. S. 273 (1968); In Re Gault, 387 U. S. 1 (1967);

III. SUBSTANTIVE RIGHTS OF STUDENTS

A. Freedom of Expression, Petition, and Assembly

Tinker v. Des Moines Indep. Community School Dist.,
393 U. S. 503 (Feb. 24, 1969);

West Virginia Board of Education v. Barnette,
319 U.S. 624 (1943);

Burnside v. Byars,
363 F. 2d 744 (5th Cir. 1966);

Blackwell v. Issaquena County Board of Education,
363 F. 2d 749 (5th Cir. 1966);

Jones v. Tennessee Board of Education,
407 F. 2d 834 (6th Cir.), cert. granted,
396 U.S. 817 (1969), writ dismissed as improvidently granted, 397 U.S. ___ (1970);

Norton v. Discipline Comm. of East Tenn. State Univ.,
419 F. 2d 195 (6th Cir. 1969), petition for cert. filed,
38 U.S.L.W. 3306 (U.S. Dec. 29, 1969) (No. 1011);

Esteban v. Central Mo. State College,
415 F. 2d 1077 (8th Cir. 1969), petition for cert. filed,
38 U.S.L.W. 3331 (U.S. Jan. 2, 1970) (No. 1026);

Saunders v. VPI,
417 F. 2d 1127 (4th Cir. 1969);

Frain v. Baron,
307 F. Supp. 27 (E.D.N.Y. 1969);

Sheldon v. Fannin,
221 F. Supp. 766 (D. Ariz. 1963);

Butts v. Dallas Indep. School Dist.,
306 F. Supp. 488 (N.D. Tex. 1969);

Compare Pickering v. Board of Education,
391 U.S. 563 (1968); Puentes v. Board of
Education, 24 N.Y. 2d 996, 250 N.E. 2d 232,
302 N.Y.S. 2d 824 (1969);

Brown v. Greer,
296 F. Supp. 595 (S.D. Miss. 1969);

Einhorn v. Maus,
300 F. Supp. 1169 (E.D. Pa. 1969);

See generally Aldrich, Freedom of Expression in Secondary Schools, 19 Cleve-St. L. Rev. 165 (1970);

Note, Symbolic Speech, High School Protest and the First Amendment, 9 J. Fam. Law 119 (1969);

B. Freedom of the Press and Other Media

Distribution

Note the applicability of cases cited above.

Scoville v. Board of Educ.,
415 F. 2d 860 (7th Cir. 1969), rev'd on rehearing, ____ F. 2d ____,
No. 17190 (7th Cir. Apr. 1, 1970) (en banc);

Vought v. Van Buren Public Schools,
306 F. Supp. 1388 (E. D. Mich. 1969);

Sullivan v. Houston Indep. School Dist.,
307 F. Supp. 1328 (S. D. Tex. 1969);

Schwartz v. Schuker,
298 F. Supp. 238 (E. D. N. Y. 1968);

Dickey v. Alabama Bd. of Educ.,
273 F. Supp. 613 (M. D. Ala. 1967), vacated as moot,
402 F. 2d 515 (5th Cir. 1968);

Antonelli v. Hammond,
____ F. Supp. ____, Civ. No. 69-1128-G (D. Mass. Feb. 5, 1970);

Access

Lee v. Board of Regents,
306 F. Supp. 1097 (W. D. Wis. 1969);

Zucker v. Panitz,
299 F. Supp. 102 (S. D. N. Y. 1969);

But see Panarella v. Birenbaum, 60 Misc. 2d 95, 302 N.Y.S. 2d 427 (Sup. Ct. Richmond County 1969);

See generally Nahmod, Black Arm Bands and Underground Newspapers: Freedom of Speech in the Public Schools, 51 Chi. Bar Rec. 144 (Dec. 1969); Also: Beyond *Tinker*: The High School As An Educational Forum, 5 Harv. Civ. Rts. L. Rev. 278 (1970) High School Students are Rushing Into Print, and Court, Nations Schools, p. 30 (Jan. 1969).

C. Freedom of Association: Political and Social

Hughes v. Caddo Parish School Bd., 57 F. Supp. 508 (W.D. La. 1944), aff'd mem., 323 U.S. 685 (1945);

Waugh v. Board of Trustees, 237 U.S. 589 (1915);

Compare NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958);

Shelton v. Tucker, 364 U.S. 479 (1960);

Bates v. City of Little Rock, 361 U.S. 516 (1960);

See generally Emerson, Freedom of Association and Freedom of Expression, 74 Yale L.J. 1 (1964).

D. Freedom from Vague, Uncertain, and Sweeping Disciplinary Rules

Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328 (S.D. Tex. 1969);

Soglin v. Kauffman, 295 F. Supp. 978 (W.D. Wis. 1968), aff'd, 418 F.2d 163 (7th Cir. 1969);

Cf. Scott v. Alabama Bd. of Educ., 300 F. Supp. 163 (M.D. Ala. 1969);

Meyers v. Arcata Union High School Dist.,
269 Cal. App. 2d ____, 75 Cal. Rptr. 68 (Dist. Ct. App. 1969),
hearing denied mem. (Cal. Sup. Ct. Apr. 9, 1969);

But see Esteban v. Central Mo. State College,
415 F. 2d 1077 (8th Cir. 1969), petition for cert. filed,
38 U. S. L. W. (U. S.) (No.);

Norton v. Discipline Comm. of East Tenn. State Univ.,
419 F. 2d 195 (6th Cir. 1969), petition for cert. filed.
38 U. S. L. W. (U. S.) (No.);

See generally Note, Uncertainty in College Disciplinary
Regulations, 29 Ohio St. L. J. 1023 (1968).

IV. STUDENT DRESS CODES AND REGULATIONS

Supreme Court Review Denied on Three Occasions

Kahl v. Breen,
296 F. Supp. 702 (W. D. Wis.), aff'd, 419 F. 2d 1035 (7th Cir. 1969),
petition for cert. filed, 38 U. S. L. W. 3348 (U. S. Mar. 10, 1970)
(No. 1274);

Ferrell v. Dallas Indep. School Dist.,
261 F. Supp. 545 (N. D. Tex. 1967), aff'd, 392 F. 2d 697 (5th Cir.)
(2-1), cert. denied, 393 U. S. 856 (1968);

Akin v. Board of Educ.,
262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (Dist. Ct. App. 1968),
hearing denied mem. (Cal. Sup. Ct. July 10, 1968) (Peters, J.,
dissenting), cert. denied, 393 U. S. 1041 (1969);

Marshall v. Oliver,
No. B-2932 (Cir. Ct. Richmond, Virginia, Dec. 20, 1965),
cert. denied, 385 U. S. 945 (1966);

Historical Context

Ho Ah Kow v. Nunan,
12 Fed. Cas. 252 (No. 6546) (C. C. D. Calif. 1879);

Valentine v. Indep. School Dist. of Casey,
187 Iowa 555, 174 N. W. 334 (1919);

Pugsley v. Sellmeyer,
158 Ark. 247, 250 S. W. 538 (1923);

Recent Decisions Favoring Students

Kahl v. Breen, supra;

Sims v. Colfax Community School Dist.,
307 F. Supp. 485 (S. D. Iowa 1970) (hair length of female student);

Cabillo v. San Jacinto Junior College,
305 F. Supp. 857 (S. D. Tex. 1969) (bearded college student);

Olff v. East Side Union H. S. Dist.,
305 F. Supp. 557 (N. D. Calif. 1969) (male hair length);

Richards v. Thurston,
304 F. Supp. 449 (D. Mass. 1969);

Griffin v. Tatum,
300 F. Supp. 60 (M. D. Ala. 1969);

Westley v. Rossi,
305 F. Supp. 706 (D. Minn. 1969);

Miller v. Gillis,
_______ F. Supp. ______, No. 69 C 1841 (N. D. Ill. Sept. 25, 1969);

Hopkins v. Ayres,
______F. Supp. ______, No. WC 6974-S (N. D. Miss. Oct. 25, 1969);

Zachry v. Brown,
299 F. Supp. 1360 (N. D. Ala. 1967);

Yoo v. Moynihan,
28 Conn. Super. 375, 262 A. 2d 814 (Super. Ct. Hartford County, 1970);

Scott v. Board of Educ.,
61 Misc. 2d 333, 305 N. Y. S. 2d 601 (Sup. Ct., Nassau County 1969)
(dress code forbidding slacks);

Recent Decisions Adverse to Students

Ferrell, Akin, and Marshall, supra;

Davis v. Firment,
408 F. 2d 1085 (5th Cir. 1969) (per curiam);

Jackson v. Dorrier,
____ F. 2d ____ No. 19, 351 (6th Cir.) (pending);

Crews v. Clones,
303 F. Supp. 1370 (S. D. Ind. 1969);

Brick v. Board of Educ.,
305 F. Supp. 1316 (D. Colo. 1969);

Stevenson v. Wheeler County Bd. of Educ.,
306 F. Supp. 97 (S. D. Ga. 1969);

Contreras v. Merced Union H. S. Dist.,
E. D. Calif. Dec. 13, 1968) (not reported);

Shows v. Freeman,
230 So. 2d 63 (Miss. 1969);

Leonard v. School Comm. of Attleboro,
349 Mass. 704, 212 N. E. 2d 468 (1965);

Canney v. Board of Public Instruction,
231 So. 2d 34 (Fla. Ct. App. 1970);

See generally Notes, 15 S. D. L. Rev. 94 (1970); 42 So. Calif. L. Rev. 126 (1969); 18 Cleve-Marq. L. Rev. 143 (1969); 17 J. Pub. Law 151 (1968); 20 Ala. L. Rev. 104 (1967); 37 U. Colo. L. Rev. 492 (1965).

V. STUDENT PRIVACY : SEARCH AND SEIZURE

Phillip v. Johns,
12 Tenn. App. 354 (Mid. Sec. Ct. App. 1930);

Stein v. Kansas,
203 Kans. 638, 456 P. 2d 1 (1969),
cert. denied, 397 U. S. ____ (1970);

Overton v. New York,
24 N. Y. 2d 522, 249 N. E. 2d 366, 301 N. Y. S. 2d 479 (1969),
adhered to, ____ F. Supp. ____, 69 Civ. 40006 (S. D. N. Y. Apr. 7, 1970)
(Cooper, J.) (appeal pending);

In re Donaldson,
269 Cal. App. 2d ___, 75 Cal. Rptr. 220 (Dist. Ct. App.),
hearing denied (Cal. Sup. Ct. Apr. 2, 1969);

People v. Kelly
195 Ca. App. 2d 72, 16 Cal. Rptr. 177 (Dist. Ct. App. 1961);

But see People v. Cohen,
57 Misc. 2d 366, 292 N. Y. S. 2d 706 (Sup. Ct., Nassau County 1968);

Compare Camara v. Municipal Court, 387 U. S. 523 (1967);
Stoner v. California, 376 U. S. 483 (1964); Spevack v. Klein,
385 U. S. 511 (1967); Finn's Liquor Shop v. New York State
Liquor Authority, 24 N. Y. 2d 647, 249 N. E. 2d 440, 301 N. Y. S. 2d 584,
cert. denied, 396 U. S. 840 (1969); Colonnade Catering Corp. v.
United States, 397 U. S. ____ (1970);

See generally Notes, 17 Kans. L. Rev. 512 (1969); 3 Georgia L. Rev.
426 (1969); 4 U. San Fran. L. Rev. 49 (1969); 9 Santa Clara L. Rev.
143 (1968); 4 J. Fam. Law 151 (1964); J. Landynski, Search & Seizure
and the Supreme Court 13-61, 245-62 (1966).

SUITS FOR DAMAGES IN STUDENT RIGHTS CASES

VIII. SUITS FOR DAMAGES ON STUDENT RIGHTS CASES

Attorneys filing corporal punishment or other student rights cases should consider adding a claim for damages to their action. Criminal, equitable, and administrative remedies rarely provide full restitution for injuries to students' economic and personal interests. A full discussion of this approach can be found in Niles, *Civil Actions for Damages Under the Federal Civil Rights Statutes*, 45 TEX. L. REV. 1015 (1967).

Two recent cases in Florida, one federal and one state, emphasize the positive relief afforded by a claim for damages. In *Pyle v. Blews*, No. 70-1829-JE (S.D. Fla., March 29, 1971), a student, expelled for long hair, was reinstated in school by a court injunction. The order provided the student assistance in compensating for lost school time, expunged references to the incident from his record, and provided that no student be expelled or suspended for long hair in the future. The court also ordered the school principal to pay the student $100 compensatory damages in addition to $182 for costs and expenses incurred.

In *Tizekker v. Taylor*, a state circuit court jury in Crestview, Florida awarded a 15 year old student $500 in compensatory damages and $18,500 in punitive damages for a caning he received two years before from his junior high school principal. The principal was the only defendant. The student's father testified that his son's buttocks were black and covered with blood blisters after the incident. The unprecedented award of punitive damages was based in part on a showing by attorney Don Dewrell that the punishment was totally disproportionate to the student's offense of being one hour late for school. Dewrell also introduced other evidence attesting to the excessive nature of the punishment. There were no witnesses to the incident aside from the two people involved. The student's mother stated that her son had suffered embarrassment and humiliation as a result of the corporal punishment, and that he was fearful and hesitant about returning to the school after the incident. /Don Dewrell, P. O. Box 638, Crestview, Florida 32536./

Attorneys bringing suit under the civil rights statutes should note that nearly every right that has been brought within the due process clause of the fourteenth amendment has also been the subject of a suit for damages under the civil rights statutes. *Tinker*, a long list of hair cases, and numerous other student rights cases have recognized the student's clear right to have his constitutional rights protected. Courts and juries have not hesitated in the past to award compensatory and punitive damages for the violation of these very same rights. *Basista v. Weir*, 340 F.2d 74 (3rd Cir. 1965); *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D. N.Y. 1970); *Antelope v. George*, 211 F. Supp. 657 (D. Idaho 1962).

An award of damages under 42 U.S.C. § 1983 reflects the intent and spirit of the Civil Rights Acts. Courts have oftentimes commented on the usefulness and flexibility of section 1983 as a means of providing remedies for violations of constitutional rights. The addition of a claim for damages not only serves as a means of compensating the plaintiff for the harm and deprivation he has suffered, but is also useful as an incentive for many low income clients who recognize that their involvement in major litigation can be an arduous, costly, and time-consuming process.

Under proper circumstances, damage claims can also be useful bargaining tools in efforts to secure settlements, consent decrees, and changes in school regulations.

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Tort liability

False arrest–Denial of civil rights–Leafletting –$5000 damages against two university police officers

Greene v. Ward, Civ. Action No. C-313-70 (C.D. Utah Dec. 8, 1971).

Plaintiff is a student at the University of Utah. On Sept. 26, 1971, he was distributing leaflets in front of the university's football stadium. The leaflets, given only to those who would accept them, were an invitation to a "People's Banquet" to be held in protest against a $100.00-a-plate dinner the same evening in honor of Vice President Agnew. Plaintiff had complied with university regulations governing the distribution of leaflets on campus. Two campus police officers after accepting a copy of the leaflet, placed him under arrest, pulled him aside for questioning, handcuffed his hands behind his back, and searched his person. (The complaint alleged that the defendants "verbally assaulted and abused plaintiff with the intent and purpose of humiliating and embarrassing plaintiff in the presence of the public generally, and particularly the people present at the scene.")

The defendants apparently checked with the Student Activities Center and ascertained that plaintiff was lawfully distributing the leaflets. Instead, they arrested him for littering, a misdemeanor. In order to do so, they had to search the area for a leaflet and eventually found one about 50 feet from where plaintiff had been distributing them to the public. Plaintiff was taken to the campus police headquarters and then before a justice of the peace where a plea of not guilty was entered and bail set. He was taken to the city jail's "drunk tank" to be held until released on bail.

The suit, brought under 42 *U.S.C.* § 1983 and 28 *U.S.C.* § 1343, alleged that defendants had deprived plaintiff of his rights to freedom of speech under the first amendment, to be secure in his personal effects, to be free from unreasonable search and seizure under the fourth amendment, and to due process and equal protection under the fourteenth amendment. It sought $5000 in compensatory and $20,000 in punitive damages for each of two charges, false arrest and deprivation of civil rights.

Plaintiff was later told by the university that it would drop the littering charge if he would drop the entire matter. But shortly after the damage action was filed, plaintiff was notified that trial had been set on the littering charge. Plaintiff's attorney then filed suit in federal district court asking for an injunction against prosecution of the littering charge on the grounds that it was undertaken without probable cause, in bad faith, and with intent to chill exercise of first amendment rights. The district court (Ritter, J.) enjoined the littering prosecution during the pendency of the civil rights false arrest action. At the hearing on the injunction, the police officers admitted that they had not had probable cause for arrest on the littering charge.

Since the parties were not able to settle out of court (plaintiff offered to settle for $2500, defendants for $500) trail was had before a jury. The judge ruled that, as a matter of law, there had been a false arrest. His ruling was based on the lack of probable cause since the officers had not seen plaintiff litter nor had any other person, nor had they even seen a leaflet on the ground prior to the arrest. The ruling was also based on *Schneider v. State*, 308 U.S. 162, which held that a littering ordinance could not be used to suppress the handing out of leaflets. The only issue to go to the jury was the question of damages. Plaintiff's counsel stressed in argument to the jury the humiliation and embarrassment of being arrested in front of the many people in the area where the leaflets were being distributed, plaintiff's handcuffing, the fact that plaintiff had been placed in jail and, most importantly, the fact that the criminal charge would always be on his record and would have to be explained to potential employers, etc.

The jury returned a verdict of $1000 general damages and $4000 punitive damages. Since the officers were insured only as to the compensatory damages and would personally have to pay the other $4000, the action was eventually compromised at $1000 compensatory paid by the insurance and $1000 from each of the officers.

Comment

This case is remarkable as a milepost in student-university relations since it is not very frequent that damages are awarded in civil rights actions and they are seldom awarded against police officers because of juries' reluctance to do anything that might make police work more difficult. The suit and award also disprove the presumption that juries, reflecting general public sentiment, can be expected to be anti-student.

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FREEDOM OF INFORMATION

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IX. FREEDOM OF INFORMATION

For legal services attorneys, freedom of information questions arise in two contexts: (1) the right to view, challenge, or control an individual student's school records, and (2) the right to receive statistics or information about the overall operation of a school or a school system.

State laws governing access to these data are an incredible hodgepodge. Many, perhaps most, have no state-wide policy and leave these matters to each local school board. Over thirty states have some form of freedom of information legislation, but most are either weak, or do not apply to school matters. Others confess that they handle their access to information problems "on an individual basis without formal procedures."

A. Access to Individual Student's Records

The problem of parent or student access to an individual student's records may arise in a number of contexts. Most commonly, the right to view a student's records will arise when some action or sanction has been taken or threatened against the student. In this instance, the student or parent desires access to information that allegedly serves as a basis for the school's action.

Attorneys confronted with these problems should assert that students and their parents have a right to see and challenge all school records concerning the student. School records include both official and unofficial records of the student. Official records are usually the cumulative records that accompany a child throughout his school career, such as transcripts, counseling reports, and some notations of a student's problems -- both academic and disciplinary. "Unofficial" data varies from one school, district or state to another; unofficial records may include teacher notes, guidance data, record books, correspondence, reports from social agencies, clinics, hospitals, psychiatrists and psychologists or any other data which may be misleadingly dubbed "informal," "temporary," or "not a permanent part of the pupil's official school records." Any attorney confronted with an access to information problem should first scrutinize relevant statutes in his state. Case law in this area is still relatively sparse. The following list sets out some of the leading cases.

The leading case, Van Allen v. McCleary, 211 N.Y.S. 2d 501 (1961), by Mr. Justice Brennan (then a New York Supreme Court judge) granted a petition for a writ of mandamus and held that a parent is entitled as a matter of law to inspect this child's school records. In so holding, the court expressly stated that absent constitutional, legislative or administrative permission or prohibition (regulation of the state Commissioner of Education), a parent has a common law right to inspect the records of his child maintained by the school authorities.

Acting in a case brought by the New York Civil Liberties Union in behalf of a city pupil and her mother, New York State Education Commissioner Ewald Nyquist ruled on February 25, 1972 that parents have a right to see all school records concerning their children, including teachers' comments, guidance notes and other informal data that are placed in a student's file. This ruling is a significant step beyond McCleary, which expressly stated that the parent's right did not extend beyond access to the student's official school records. While the ruling does not have the binding effect of state law or administrative regulations, Nyquist has indicated that his ruling represents the firm policy of the Commissioner's office and the state department of education. The Nyquist ruling directed that the full contents of the student's records be made available for inspection by her parents. A fair interpretation of the ruling would allow parents access to such data as teacher notes, guidance data, record books and correspondence and reports from social agencies, clinics, hospitals, psychiatrists and psychologists.

In Creel v. Brennan (Bates College Case), No. 3572, Superior Ct. of Androscoggin City, Maine (1968), the court upheld the parent/student right to see and challenge high school recommendations to college admissions offices. However, the school's right to include non-academic (disciplinary) material in such recommendations was upheld in Einhorn v. Maus, 300 F. Supp. 1169 (1969). N.B. Elder v. Anderson, 23 Cal. Rptr. 48 (1962), which upheld a student's right to damages for improper release of information about him.

B. Access To Information Or Statistics About The Overall Operation Of A School Or School System

Attorneys who represent parents/students in a school related action often find themselves in need of overall statistics about the school or school system. Included in this data might be such things as statistics about racial composition, test scores, tracks, college access, records of school practices, names and addresses of students or school personnel, financial data on the school system, and other school records and information. The general public has a right to much of this information. Federal law requires local educational authorities to retain vast bodies of data as a precondition to receiving funds under various federal programs. Data to which the public does not have an automatic right of access may be easy prey for interrogatories, subpoenas and other discovery devices. Federal Register, Vol. 36, No. 39, p. 3717, Feb. 26, 1971.

The following cases set out some of the situations which have dealt with access to these kinds of statistics and information.

A New York case, Marmo v. N.Y.C. Bd. of Education, 289 N.Y.S.2d 51 (1968), upheld the parent/student right to classmates' names and addresses for the purpose of defense in a legal suit.

Board of Trustees of Calaveras Un. Sch. Dist. v. Leach, 65 Cal. Rptr. 588 (1968), was a case in which school personnel were denied access to their own personnel records. The court's rationale was that the local school district needed to maintain a degree of confidentiality in its personnel matters. This decision presumably would also serve as the rationale to deny parent/student access to school personnel records.

Wagner v. Redmond, 127 So.2d 275 (1960), upheld the right of elected school board members to obtain the names and addresses of students from appointed school officials.

In King v. Ambellan, 173 N.Y.S.2d 98 (1958), elected school board members sought to obtain records and papers concerning an educational project under the board's aegis. The court upheld the school board's right to obtain these records.